2011

Neil Breton v. Clyde, Snow and Sessions : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

NEIL BRETON, Plaintiff and Appellant, vs. CLYDE, SNOW & SESSIONS, a Utah professional corporation, and HAL SWENSON, an individual, Defendants and Appellees.	Appellate Case No. 20110996-CA Trial Court No.090919546

BRIEF OF APPELLANT

APPEAL FROM THE DECISION OF THE THIRD JUDICIAL DISTRICT COURT
HONORABLE JUDGE ANTHONY QUINN, PRESIDING

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ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j). The Utah Supreme Court transferred this matter to this Court pursuant to an order dated November 16, 2011 and filed on November 17, 2011. **R. 946-7.**

ISSUE PRESENTED FOR REVIEW

Did the trial court commit reversible error in granting summary judgment to Defendants on the ground that Defendants' negligence was not a proximate cause of Plaintiff's damages? More specifically, was the chain of causation from Defendants' negligence to Plaintiff's damages broken by an intervening cause of Plaintiff's actions?

STANDARD OF REVIEW

Because the summary judgment procedure is "considered a drastic remedy requiring strict compliance with the rule authorizing it," *Timm v. Dewsnup*, 851 P. 2d 1178, 1181 (Utah 1993), the contentions of the party opposing a motion for summary judgment must be considered in a light most advantageous to him "and all doubts resolved in favor of permitting him to go to trial. The motion can only be granted when, viewing the matter that way, no right to recovery could be established." *Controlled Receivables, Inc. v. Harman*, 17 Utah 2d 420, 413 P. 2d 807, 809 (Utah 1966). Only when it appears that "upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail...is the court justified in refusing such a party the opportunity of presenting his evidence and attempting to persuade the fact trier to his views." *Holbrook Company v. Adams*, 542 P. 2d 191, 193 (Utah 1975).

Any doubts should be resolved in allowing the nonmoving party "the opportunity of at least attempting to prove his right to recover." *Durham v. Margetts*, 571 P. 2d 1332, 1334 (Utah 1977). "A trial court is not authorized to weigh facts in deciding a summary judgment motion, but is only to determine whether a dispute of material fact exists, viewing the facts and all reasonable inferences to be drawn therefrom in a light most favorable to the nonmoving party." *Pigs Gun Club, Inc. v. Sanpete County*, 42 P.3d 379, 385 (Utah 2002) (citation, quotations, and parenthetical omitted).

"[B]ecause negligence cases often require the drawing of inferences from the facts, which is properly done by juries rather than judges, summary judgment is appropriate in negligence cases only in the clearest instances." *Price v. Smith's Food and Drug Centers, Inc.*, 252 P.3d 365, 367 (Ut. Ct. App. 2011) (citation and quotations omitted). A trial court is precluded from granting summary judgment "if the facts shown by the evidence on a summary judgment motion support more than one plausible but conflicting inference on a pivotal issue in the case... particularly if the issue turns on credibility or if the inference is dependent upon subjective feelings or *intent*." *Uintah Basin Medical Center v. Hardick*, 2008 UT 15, ¶ 19, 179 P. 3d 786. (emphasis in the original)

When reviewing a trial court's grant of summary judgment, this Court will "not defer to the trial court's conclusion that facts are undisputed nor its legal conclusions supported by those facts." *Kilpatrick v. Wiley, Rein & Felding*, 909 P.2d 1283, 1289 (Ut. Ct. App. 1996) (citation and quotations omitted). This Court will "therefore review the trial court's grant of summary judgment for correctness." *Id.* (citation omitted). *See also, Wolf Mountain*

Resorts, LC v. ASC Utah, Inc., 2011 UT App 425 ¶ 8 (appellate court reviews trial court's 'legal conclusions and ultimate grant or denial of summary judgment' for correctness...)(citation omitted).

ISSUE PRESERVATION

Defendants' Motion, and then Renewed Motion, for Summary Judgment were fully briefed by Defendants and were opposed by Plaintiff. **R. 210-402, 403-405, 414-416, 417-667, 668-904, 908-921.**

STATEMENT OF THE CASE

Plaintiff Neil Breton ("Plaintiff" or "Neil"), along with his brother and two sisters, were co-trustees of the Testamentary Grandchildren's Trust (the "GC Trust") of Saul Breton, their father, who died in the mid-1980's. The GC Trust was established but not funded in his will. The co-trustees had to resolve financial issues left by Saul Breton at the time of his death, and funded the Trust with certain assets from Saul Breton's businesses. For a variety of reasons, by the mid-1990's, the GC Trust was essentially without assets. Also during these years, there were intra-family disputes, including between the Plaintiff and his sister and brother-in-law, Rhonda and Mark Slater. In late Summer 2004, the Plaintiff, urged on by his sister Jana Hadany, attempted to end the family enmity. Plaintiff had set aside approximately $350,000 of his own money in an attempt to fulfill the wishes of his father and provide some money to each of the (by now) fifteen grandchildren, including the three sons of Rhonda and Mark Slater: Breton, Jordan, and Hayden (the "Slater Boys"). Plaintiff retained the Defendants to create a "Plan" whereby he could make gifts to the fifteen

grandchildren/Trust beneficiaries out of his personal funds and at the same time try to resolve outstanding family issues. Plaintiff specifically told the Defendants that this needed to be a "all or nothing" Plan; in other words, unless all fifteen of the grandchildren agreed to the Plan, the Plan could not go forward. The Defendants drafted and sent to each of the beneficiaries a document entitled "Receipt and Release, Consent to Termination of the Trust by Sworn Statement" ("Receipt and Release"), in which each beneficiary agreed to accept $24,000 in return for releasing any potential claims the beneficiary thought he or she may have against the GC Trust and any of the co-trustees, and also agreed to release his or her interest in the GC Trust and allow the GC Trust to be terminated. However, the language in that document as drafted by the Defendants was not clear that if not all beneficiaries signed, there would be no deal.

Twelve of the fifteen grandchildren agreed to sign a Receipt and Release and to receive a $24,000 payment each, but the Slater Boys initially held off. For several months, from December 2004 into mid-September of 2005, they repeatedly gave excuses to the Plaintiff (and to his brother and fellow co-trustee Willie Breton) that they were still thinking about the proposal, they thought they'd agree to it, they needed more information, they needed additional copies of the Plan documents.

Meanwhile, in or about February of 2005, while waiting for the Slater Boys to make up their minds, having told the Defendants that 12 of the 15 beneficiaries had agreed to the Plan and that they wanted to pay each of them the $24,000, and having not been advised by the Defendants against any distribution to most but not all of the beneficiaries, the Plaintiff

distributed those funds to, and received signed releases from, the twelve non-Slater Boys beneficiaries. The Plaintiff held in reserve the $72,000 for the Slater Boys, hoping that an ongoing dialogue between them and Willie Breton would lead to their agreeing to the Plan.

In July and August emails from Breton Slater to Willie Breton, Breton Slater said that he and his brothers had decided to accept the Plan. But then, in mid-September 2005, the Slater Boys rejected the proposed Plan, unless they were each paid almost three times as much as each of the other beneficiaries had been paid. The Plaintiff rejected that proposal.

In late June, 2007, the Slater Boys sued Neil and Willie Breton in California, claiming breach of fiduciary duties and mismanagement of the GC Trust (they did not sue their mother or aunt, both of whom had been co-trustees of the Trust), asking for millions of dollars. Ultimately, the Plaintiff settled that litigation for a fraction of what the Slater Boys claimed, but still incurred approximately $900,000 in fees, costs, and settlement payments. Subsequently, the Plaintiff sued the Defendants for legal malpractice. After extensive fact discovery, the Defendants moved for summary judgment on the sole issue of causation.

Defendants argued that their negligence was not a proximate cause of Plaintiff's damages, under four different theories. The Trial Court rejected three of the four theories, but agreed with Defendants that as a matter of law, Plaintiff's distribution of monies and obtaining releases from all of the beneficiaries except the Slater Boys, knowing that the Slater Boys could still sue him, broke the chain of causation from Defendants' negligence and was an independent and intervening cause of Plaintiff's damages.

STATEMENT OF FACTS[1]

I. The Underlying Case

1. In 1981, Saul Breton executed his will, in which he purported to give the Trustee, in trust, $1,000,000.00 that would be held for the benefit of his grandchildren. The assets to fund this trust were undesignated in his will. **R. 705.** Saul's four children (Neil, Willie, Rhonda, and Jana) were named as co-trustees of the GC Trust. **R. 474.**

2. At the time of Saul Breton's death, his estate had no cash, the assets that existed were not readily marketable, and the estate had a negative net worth. **R. 711 at p. 158; R. 817.** The four co-trustees, following approval in 1986 by the California probate court, **R. 792-814**, distributed assets of stock, a small amount of cash, and various receivables and unsecured promissory notes to the GC Trust. Due to unforeseen market conditions in real estate and the apparel industry (Breton Industries' principal business), the large majority of the value of these assets was lost. **R. 816-818.**

3. During the 1990's and into 2000 and beyond, the companies founded by Saul Breton, including Breton Industries, were caught up in years of litigation. Some of that litigation involved Rhonda Breton Slater and her husband, Mark Slater, the parents of the

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[1] Even though the Trial Court granted Defendants summary judgment on a very narrow issue, Plaintiff's Statement of Facts is lengthy in order for this Court to understand the context of the Trial Court's ruling, and also to understand the significant amount of genuine issues of material fact that not only led to the Trial Court denying the majority of Defendants' arguments, but which Plaintiff asserts shows why the Trial Court's ruling is in error.

Slater Boys. **R. 723-24 at pgs. 303-07.** During that time period, Neil Breton, having purchased a judgment against Rhonda and Mark Slater, nonjudicially foreclosed on their house. After giving them every opportunity to pay the judgment and retain their house, Neil was rebuffed by the Slaters and he successfully completed the foreclosure. **R. 706 at pgs. 81-83.**

4. In 1998, the oldest Slater Boy, Breton Slater, graduated from high school and sent a letter to three of the four co-Trustees of the GC Trust (his mother Rhonda had resigned her co-trustee position in 1993), asking about whether there were Trust funds available for his use for college, and asked for an accounting of the GC Trust. **R. 442.** That led to correspondence between him and Neil Breton, including a letter from Neil outlining the history of the assets in the GC Trust and their decline. **R. 816-818.** Breton did not think that what Neil provided was a sufficient accounting, **R. 444 ¶ 13,** but he did nothing further to obtain documentation or a more complete accounting from 1998 until he met with his uncle, Mike Rosson, in or about 2006 to discuss his concerns. During those eight years he did not ask his mother, a former co-trustee, about the GC assets or for an accounting; he did not follow up with Neil Breton or any of the other co-trustees; and he did not consult with any attorney or accountant. **R. 729, 731-2, 736 at pgs. 52, 62-5, 86-7.**

5. Notwithstanding that lack of information, Breton Slater concluded that the co-trustees had mismanaged the GC Trust, breached their fiduciary duties to the beneficiaries, and hid their malfeasance from the beneficiaries. **R. 444 ¶ 11.**

6. In 2004, Neil retained the Defendants to advise him with respect to his role as co-trustee of the GC Trust and his desire to make gifts from his personal funds to the beneficiaries of the GC Trust, while resolving any outstanding issues and resolving any potential claims of those beneficiaries against the co-trustees of the Trust, and causing the termination of the GC Trust. **R. 3 ¶ 6.** Neil decided to consult with the Defendants because he was being pressured by his brother Willie and sister Jana, on behalf of their mother, to try to obtain a global resolution of what had become bitter family issues. **R. 708-09 at pgs. 120-126.**

7. During his initial telephone conference with Defendant Hal Swenson, Neil told Swenson about the lengthy history of bad feelings between him and the Slater parents, the background of the family business litigation, the lack of value of the GC Trust, and how Neil, his brother Willie, and his sister Jana hoped, through the advice and work of the Defendants, to effect a global resolution of the family disputes and to fulfill the intent of his father Saul to have the (now) 15 grandchildren receive some money. **R. 712-13 at pgs. 185-88; R. 773 at pgs. 22-23.**

8. Neil provided to Defendants various documents relating to the GC Trust, including his father's will. Neil also provided information and documents to Defendants clearly demonstrating the family business litigation and the bitter feelings between Neil and his sister Rhonda Slater and her children, the Slater Boys. **R. 3-4 ¶ 7.**

9. Defendants drafted various documents and correspondence and sent a set of each to the co-trustees and the 15 beneficiaries of the GC Trust. The key document was titled "Receipt and Release, Consent to Termination of the Trust by Sworn Statement," in which each beneficiary was offered $24,000 in return for the beneficiary acknowledging "that the proposed payment of $24,000 from Neil Breton will be in full payment and satisfaction of the undersigned's interest in the Grandchildren's Trust." The Receipt and Release included a release of "Neil Breton, Jana Breton and William Breton, as Trustees of the Grandchildren's Trust, from any and all liability in connection with the undersigned's interest in the Grandchildren's Trust." **R. 4 ¶s 9-11; R. 505-06; Addendum 6 (exemplar of Receipt and Release).**

10. A letter dated December 10, 2004, drafted by Defendants, from Plaintiff and his brother William Breton to each of the co-trustees and their children, discussed the loss of the GC Trust assets and stated in pertinent part, "this letter will ... propose a distribution of assets presently held outside of the testamentary trust that benefits Saul's grandchildren . . . **Each** payment would be conditioned upon each child and each grandchild (or such grandchild's legal guardian if under age 18) agreeing to the termination of the Grandchildren's Trust and waiving claims against the Trustees of the Grandchildren's Trust." **R. 501-03.** (emphasis supplied).

11. The Defendants drafted these documents with input from Neil and his brother Willie, but Neil relied upon Defendants to craft these legal documents and attendant

correspondence with the most important goal of all in mind: to protect the three co-trustees, Neil, Willie, and Jana, from any subsequent litigation. He wanted this plan to be an "all or nothing" Plan; either all beneficiaries would get payments and all would release the co-trustees, or none would get payments. **R. 712-14 at pgs. 186-88, 208-09.** Defendants knew that the Plan had to be "all or nothing." **R. 712-13 at pgs. 187-188; Addendum 5.** Swenson and his associate Matt Wiese knew Neil relied on their expertise. **R. 774 at p. 27, 777 at p. 72; R. 781 at p. 66.**

12. The Plan Defendants devised and implemented in response to Neil's stated desire to implement a gifting plan for the beneficiaries of the GC Trust and the resolution of outstanding issues between the Slaters and the Bretons was contrary to California law and the Receipts and Releases violated the spendthrift provisions of the GC Trust, subjecting the grandchildren who executed those documents to claims that they violated the no-contest clause of the GC Trust. **R. 5-6 ¶ 16.**

13. In 2004, there were 15 beneficiaries of the GC Trust, limiting any potential recovery by the Slater Boys to 3/15 of the recovery for the GC Trust as a result of any litigation. The Receipt and Release documents sent to the 15 beneficiaries had the effect of purporting to eliminate the interests of each of the beneficiaries of the GC Trust who executed a Receipt and Release, ostensibly leaving as beneficiaries only those who refused to release the co-trustees and who refused the payment by Neil. **R. 6 ¶ 17.**

14. Twelve of the beneficiaries signed the Receipts and Releases; the three Slater Boys did not, but indicated in June and July 2005 that they were going to sign, **R. 823-824.** However, on September 14, 2005, they emailed Willie Breton that they refused to sign unless each of them received $66,666.66. **R. 825.**

15. The execution of the Receipts and Releases by less than all of the beneficiaries appeared to leave the Slater Boys as the only remaining beneficiaries of the GC Trust. After the other 12 Receipts and Releases were signed, the Slater Boys believed, **R. 735 at p. 82,** and then claimed in their subsequent lawsuit against Neil and Willie Breton, that they were the sole beneficiaries of the GC Trust. **R. 870 at (X), R. 877 at (II).**

16. In or about February, 2005, Neil, his brother William, and his sister Jana were interested in distributing the $24,000 each to the twelve beneficiaries who signed the Receipts and Releases. The Defendants knew that, and knew that only twelve of the fifteen grandchildren had signed the Receipts and Releases at that point, but the Plaintiff "never got any advice from my lawyers not to distribute any money until we had everybody's signatures." **R. 713 at p. 190, R. 721 at pgs. 269-70; Addendum 5.** Defendant Swenson did not think that was a critical issue. **R. 775 at p. 53.**

17. In February, 2005, the three co-trustees distributed $24,000 each to the twelve beneficiaries who had signed their Receipt and Release documents. Neil held the $24,000 each earmarked for the Slater Boys, who were engaged in dialogue with Willie Breton about whether they would agree to the Plan. **R. 716-718 at pgs. 238-248.** The Plaintiff "had a

strong indication that everyone was signing." **R. 713 at p. 190.** Neil was prepared to hold the Slater Boys' dollars "indefinitely." **R. 718-19 at pgs. 251-2; Addendum 5.** In July and in August, 2005, Breton Slater emailed Willie Breton, saying in each email that he and his brothers had decided to agree to the Plan and would sign the Receipts and Releases. **R. 823-824.** Then, in a September 14, 2005 email, he said the Slater Boys would not sign unless they were paid $66,666.66 each. **R. 825.**

18. In or about the summer or fall of 2006, Mike Rosson, the Slater Boys' uncle and Rhonda Slater's brother-in-law, told the Slater Boys that he would pay for a consult with a lawyer about potential claims against Neil and Willie Breton, directed them to the California counsel who they then retained, and paid for those lawyers during the subsequent California litigation. **R. 746-748 at pgs. 112-14, 117 and 130.**

19. In June 2007, the Slater Boys' California counsel filed a Petition against Neil and Willie Breton, in the Superior Court for the State of California. The claims of GC Trust mismanagement concerned three or four actions approved by all four co-trustees, including their mother Rhonda, and all of those actions predated 1994. **R. 710 at p.140; 864-5 at ¶s 14-17.**

20. The litigation was hotly disputed and ultimately settled in January 2009. Neil Breton ultimately paid a settlement figure of $225,000.00. **R. 564.** The Slater Boys' attorneys fees and costs were paid by Rosson, totaling approximately $337,300. **R. 748 at**

p. 130. The Slater Boys had alleged in their March 26, 2007 demand letter to the Bretons that the value of their claims exceeded $4 million, then doubled per statute. **R. 899.**

21. At the time the Slater Boys retained California counsel in or about October, 2006, they and their uncle Mike Rosson knew that the other twelve beneficiaries had signed Receipts and Releases. **R. 747 at p. 117.** The Slater Boys believed, as of the filing of their June 27, 2007 Petition, and October 26, 2007 First Amended Petition, that the three of them together held 100% interest in the GC Trust. **R. 870 at (X); R. 876 at (I)(2).**

II. This Case

22. Defendants' Renewed Motion for Summary Judgment focused solely on causation. Accordingly, for purposes of their Motion, Defendants admitted negligence and damages. **R. 417-419.**

23. Defendants argued that Neil failed to fulfill the causation element of his professional negligence claims for several reasons: (1) the Slater Boys did not sue him because Defendants' negligence in creating the plan and drafting the plan documents gave the Slater Boys an economic incentive to sue him, **R. 430-432**; (2) Neil's own actions, including that he failed to inform the Defendants of the California lawsuit or that Defendants' actions were the cause of that lawsuit, and that he gave Defendants no opportunity to participate in that lawsuit or otherwise provide input to Neil in that regard, were an intervening cause of his damages, **R. 434;** (3) Neil's actions as a co-trustee predating his retention of the Defendants was the cause of the Slater Boys suing him and

causing his damages; and (4) Neil's (and his co-trustees') decision to pay $24,000 each to the twelve other beneficiaries knowing that he did not have executed Receipts and Releases from the Slater Boys, and knowing that the Slater Boys retained their ability to sue him, was an intervening cause of Neil's claimed damages. **R. 433-434 .**

24. In opposition, Neil raised and argued genuine issues of material fact as to all of Defendants' arguments. **R. 668-699**.

III. The Trial Court's Ruling

25. At the start of the hearing on Defendants' Renewed Motion for Summary Judgment on July 27, 2011, the Court told the parties that his preliminary view was that the Defendants had three causation arguments: (1) Neil's economic incentive theory of causation failed as a matter of law; (2) any chain of causation was broken by Neil's decision to distribute funds to the twelve beneficiaries without having received releases from the Slater Boys, and (3) Neil's alleged breaches of fiduciary duties as a co-trustee prior to his retention of the Defendants were the sole cause of his damages. **R. 948 at 2.** The Court then told the parties that "I think that there are reasonable inferences that can be drawn from the facts that would preclude summary judgment in this case..." **R. 948 at 3.** The parties then made their arguments. **R. 948 at 4-51.**

26. At the end of argument, the Court allowed the Defendants to deliver to him additional deposition transcript citations and copies of certain cases, and gave Neil a chance

to respond. The Court then asked counsel to return on August 1, 2011 for his ruling. **R. 948 at 50-53.**

27. The parties provided additional materials and argument to the Court. **Addendum 4, 5**[2].

28. At the August 1 hearing, the Court reiterated Defendants' arguments and stated that he still believed that summary judgment was not appropriate as to all of Defendants' arguments, except one: that Neil's payment of the $24,000 to each of the twelve beneficiaries before obtaining executed Receipts and Releases from the Slater Boys broke the chain of causation as an intervening cause. The Court had changed his mind: "I'm going to grant the motion for summary judgment on that one ground." **R. 949 at 2-4, 10.**

29. The Court came to this conclusion based on how the Court interpreted Neil's opposition to Defendants' "intervening cause" argument:

> What he's really saying is that he should have been told that if he didn't get releases from all 15 then he was exposed to the possibility of a lawsuit from the Slater brothers. And I guess the problem that I have with that from a causation standpoint is that he seems to concede that he already knows that, and how can the lack of that advice be the cause of the injury if he already knew what he would like to have been advised of...So it really comes down to what was caused by the failure to specifically advise Mr. Breton that if you don't get all 15 to sign you're still at risk, and you distribute to the 12 you're

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[2] The materials in Addendum 4 and 5 are part of the Record on Appeal, but apparently the Trial Court did not include them as part of the Record, so Plaintiff has added them, as they were produced to the Trial Court, to his Addendum.

still at risk for being sued by the other three. And I think that it's so clear in anybody's mind that he was still at risk to be sued by the other three that the failure to tell him that was not the cause of what happened.

R. 949 at 4-5, 7.

SUMMARY OF ARGUMENT

The Court should find that the Trial Court erred in granting Defendants' motion for summary judgment, because there are genuine issues of material fact as to whether Defendants' negligence was a proximate cause of Neil's damages, that is, whether Neil's payment of $24,000 to each of the twelve beneficiaries who signed the Receipt and Release, was an intervening cause that freed Defendants from the consequences of their malpractice. This Court should determine that the Trial Court erred when it usurped the jury's fact-finding role, determined that there were no genuine issues of material fact as to this alleged intervening cause, and granted Defendants summary judgment on this one narrow ground.

In this case, and for purposes of Defendants' underlying Motion for Summary Judgment, it was assumed that the Receipt and Release documents crafted by Defendants did not create an "all or nothing" Plan, in which all 15 beneficiaries had to sign a Receipt and Release document (and get paid $24,000 each) or the Plan would not be effective. It was further assumed that Defendants' failure to so craft those documents was malpractice. It is undisputed that the Defendants, Hal Swenson in particular, did not advise Neil that he needed to obtain all 15 beneficiaries' signatures on Receipts and Releases before distributing any funds to any of the beneficiaries, and that Defendant Swenson did not think that was a critical

issue. In fact, because he did not so advise Neil, and those payments went forward to 12 of the 15 beneficiaries, the Slater Boys believed they then held 100% interest in the GC Trust, and that was the economic incentive for them to sue Neil.

Whether or not Neil knew that if he did not obtain signed Receipts and Releases from the Slater Boys, they had the ability to sue him if they chose, is not the relevant issue. What is relevant, and what shows the unbroken causation chain, is this: (1) when he sought their advice, Defendants did not advise Neil to NOT make any distributions until he had agreements from all 15 beneficiaries that they would each sign the documents; (2) their failure to so advise him was malpractice; (3) since he wasn't so advised, Neil went forward with the payments to the 12, and receiving their signed Receipts and Releases; (4) which led the Slater Boys to think they held 100% interest in the GC Trust; (5) which gave them the economic incentive to sue Neil.

Neil's payment of $24,000 each to the 12 beneficiaries, after not being told he should not do so, was not an intervening cause of his subsequent damages suffered as a result of the Slater Boys' lawsuit. Neil's payments, after not being advised against it by the Defendants, was reasonably foreseeable by the Defendants. At the very least, the record before the Trial Court reflects a genuine issue of material fact "on whether a sufficient intervening cause broke the thread of causation between defendant's" malpractice and Neil's damages. *Kilpatrick v. Wiley, Rein & Fielding,* 909 P.2d 1283, 1293 (Ut. Ct. App 1996). Therefore,

the Court should determine that the Trial Court erred in granting summary judgment to the Defendants on the ground of intervening cause.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FOUND, AS A MATTER OF LAW, THAT A SUFFICIENT INTERVENING CAUSE BROKE THE CHAIN OF CAUSATION BETWEEN DEFENDANTS' NEGLIGENCE AND PLAINTIFF'S DAMAGES.

A. Legal Standard for Causation in a Legal Malpractice Case

Utah courts have long recognized that proximate cause is usually an issue for the jury to decide. *See, e.g, McCorvey v. UDOT*, 868 P.2d 41, 45 (Utah 1993). "Proximate cause is usually a factual issue and in most circumstances will not be resolved as a matter of law." *Unigard Ins. Co. v. City of LaVerkin*, 689 P.2d 1344, 1347 (Utah 1984). "...[I]t is the province of the jury...to determine whether the causation theory is fatally attenuated." *Butterfield v. Okubo,* 831 P.2d 97, 106 (Utah 1992). To demonstrate causation in a legal malpractice case, "the client is required to show that "absent the conduct complained of...the client would have benefitted." *Iacono v. Hicken,* 2011 UT App 377, ¶ 31 (citing *Christensen & Jensen, PC v. Barrett & Daines*, 2008 UT 64, ¶ 26, 194 P.3d 931. The defendant caused the plaintiff's damages " if its conduct was 'a substantial factor in bringing about the harm.'" *Griswold v. Snow Christensen & Martineau*, 2010 WL 4180597 (D.Utah) *3 (citing Rest. (Second) Torts § 431).

In *Kilpatrick v. Wiley, Rein and Fielding*, 909 P. 2d 1283 (Ut Ct. App. 1996), the Utah Court of Appeals scrutinized the causation element in legal malpractice cases. While noting

that causation cannot be proved based upon speculation or conjecture, the Court did explain that causation is, as an element in a cause of action, highly fact-sensitive:

> Generally, causation "cannot be resolved as a matter of law..." "Proximate cause is an issue of fact. Thus, only if there is no evidence upon which a reasonable jury could infer causation, is summary judgment appropriate..." In other words, Utah litigants do not easily dispose of the element of causation on summary judgment.
>
> Causation is a highly fact-sensitive element of any cause of action... To establish causation, Plaintiffs must persuade a fact finder that their injury was a natural result of the Defendant's breach. Plaintiffs therefore must spin together myriad facts into a durable thread that reasonably connects Defendant's breach to Plaintiff's injury. Utah courts have recognized that "[f]act-sensitve cases... do not lend themselves to a determination of summary judgment." (All citations omitted) *Id. at 1291-1292.*

B. Intervening Cause

"An intervening cause is an independent event, not reasonably foreseeable, that completely breaks the connection between fault and damages." *Steffensen v. Smith's Management Corp.,* 820 P.2d 482, 487-8 (Ut. Ct. App. 1991). And "Utah courts have always recognized the fact-intensive nature of **intervening cause** inquiries." *Kilpatrick v. Wiley, Rein & Fielding,* 909 P.2d 1283, 1293 (Ut. Ct. App. 1996)(emphasis in original)(citations omitted).

C. There is a genuine issue of material fact as to whether Neil's payment of $24,000 each to 12 beneficiaries broke the chain of causation between Defendants' negligence and Neil's damages.

Plaintiff's causation theory in this case has been that but for the malpractice of the Defendants in the devising and drafting of the Plan documents, in particular the Receipts and Releases, and lack of advice to Plaintiff that he should not pay any of the beneficiaries the $24,000 each until ALL of them agreed to the Plan, Plaintiff never would have been sued by the Slater Boys and would not have suffered the damages he did. The facts set forth above support the basis for Plaintiff's "economic incentive" argument, or at the very least raise a genuine issue of material fact: the Slater Boys waited years before suing the Plaintiff, until after they believed that they held 100% interest in the GC Trust, such that suing for alleged mismanagement damages would redound entirely to their benefit; their share would be 100%, not merely 3/15 of 100%. The Trial Court agreed. **R. 948 at p. 49.**

As set forth above in ¶ 16, Defendants were aware that not all of the beneficiaries had agreed to the Plan, and were aware that Neil and his siblings wanted to distribute the $24,000 payments to the 12 beneficiaries who had agreed to the Plan. But the Defendants, not thinking this was a critical issue, failed to advise Neil that he should not distribute any money to any beneficiaries until all beneficiaries agreed to the Plan. That malpractice, along with Defendants' malpractice in drafting the Receipts and Releases in a way that did not make it clear that it was an "all or nothing" Plan, caused the Slater Boys to believe that the other 12 beneficiaries had given up their respective interests in the GC Trust and now the Slater Boys

held 100% interest. That in turn gave them the economic incentive to proceed with a lawsuit against Neil.

The Trial Court ruled that, given the factual background articulated by the parties in their respective memoranda in support of and in opposition to Defendants' Renewed Motion for Summary Judgment, there were reasonable inferences that could be drawn to support Plaintiff's economic incentive causation argument:

> It's a reasonable inference that the reason that the case was brought in 2007 is because the other 12 people released their claims. I understand you [defense counsel] disagree with all this, but this is a reasonable inference that it's based on–it was influenced, at least to some degree, by the fact that the 12 had given up their claims, and so it opened up the possibility of recovering the entire amount of the trust or the entire claim of breach of fiduciary duty rather than just 3/15 of it.

R. 948 at p. 49.

What appeared to convince the Trial Court of an intervening cause to break the chain of causation between Defendants' negligence and Plaintiff's damages was the fact that Neil understood that if someone, like the Slater Boys, did not sign a release of claims, then that person could, if they chose, sue him at some point. The Trial Court thought that Neil's argument was that the Defendants should have advised him of this. The Trial Court misconstrued Neil's argument, which Neil's counsel (unsuccessfully) tried to clear up at the August 1, 2011 hearing. The Trial Court thought advising Neil about the general law on releases, and advising Neil that he should not distribute any money to any beneficiary until

all had agreed to the Plan, were the same thing. **R. 949 at p. 9, l. 16-18.** But it is not the same thing.

The Defendants were told by Neil, during their first encounters when their representation of Neil began, that the Plan had to be devised as an "all or nothing" Plan. Unless all 15 beneficiaries agreed to it, it would not be effective. That was Defendants' directive as they crafted the Plan, as they drafted the documents that memorialized the Plan, as they drafted the cover letters to the beneficiaries, as they continued to advise Neil as he waited to hear back from the 15 beneficiaries, and as Neil considered making the $24,000 payments to those beneficiaries who had agreed to the Plan. Defendants' malpractice at each step of that process, including failing to advise Neil to not make any payments until all 15 had agreed to the Plan, was an unbroken chain of causation; it caused the Slater Boys to believe that they held 100% interest in the GC Trust, providing them with the economic incentive to sue Neil, causing his damages.

The Defendants argued to the Trial Court (and provided a copy with their post-hearing materials, *see* **Addendum 4)** that *Harline v. Barker,* 912 P.2d 433 (Utah 1996), compellingly supported their argument that Neil's payment to 12 of the 15 beneficiaries, without the Slater Boys releasing their claims against him, was an intervening cause that broke the chain of causation. However, that case is factually distinguishable from this case, because in that case there was no issue of a failure on the part of Harline's counsel to advise him of appropriate legal action (in that case, amending Harline's bankruptcy schedules). Indeed, the facts were

opposite; Harline admitted that his counsel advised him to amend his schedules and he chose not to. *Id. at 445-6, and fn14.* To the extent that the Trial Court relied on *Harline* to support its award of summary judgment, **R. 934**, that was error.

The very same facts and reasonable inferences that were the basis for the Trial Court's rejection of Defendants' other causation arguments, especially with regard to Plaintiff's economic incentive causation argument, underlie Plaintiff's argument that his payments to 12 of the 15 beneficiaries occurred only because he was not advised, as he should have been by his counsel, to not make those payments. It was not an independent decision, it was not an intervening cause which broke the chain of causation from Defendants' negligence to Plaintiff's damages. The Trial Court erred in so determining as a matter of law, and erred in granting summary judgment to the Defendants on that ground.

CONCLUSION

In light of the foregoing, and because there are genuine issues of material fact regarding whether the payment of $24,000 each to 12 of the 15 GC Trust beneficiaries was an intervening cause, breaking the chain of causation between Defendants' negligence and Plaintiff's damages, Plaintiff respectfully requests the Court to enter an order reversing the Trial Court's ruling awarding summary judgment to the Defendants, and remanding this case for a trial on the merits.

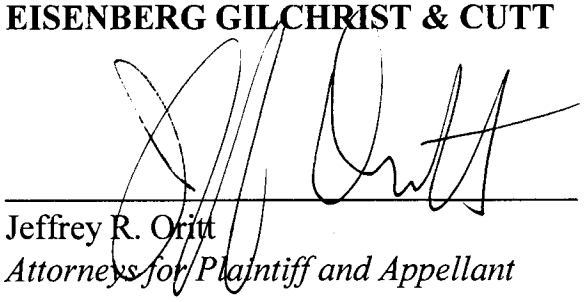
CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 6258 words, excluding the parts of the brief exempted by Utah R.App.P. 24(f)(1)(B).

This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 9 in 13 font Times New Roman.

Respectfully submitted this 6th day of February 2012.

EISENBERG GILCHRIST & CUTT



Jeffrey R. Oritt
Attorneys for Plaintiff and Appellant

ADDENDUM

1. Order Granting Defendants' Renewed Motion for Summary Judgment and Dismissing Case with Prejudice **R. 932-935**

2. Transcript of July 27, 2011 hearing on Defendants' Renewed Motion for Summary Judgment **R. 948**

3. Transcript of Court's August 1, 2011 Ruling **R. 949**

4. Cover letter and materials provided by Defendants to the Court after July 27, 2011 hearing

5. Cover letters and materials provided by Plaintiff to the Court after July 27, 2011 hearing in response to those provided by Defendants to the Court

6. Receipt and Release exemplar

CERTIFICATE OF MAILING

I hereby certify that on this 6th day of February 2012, I caused to be mailed two true and correct copies of the foregoing **BRIEF OF APPELLANT**, via first class mail, postage prepaid, to the following:

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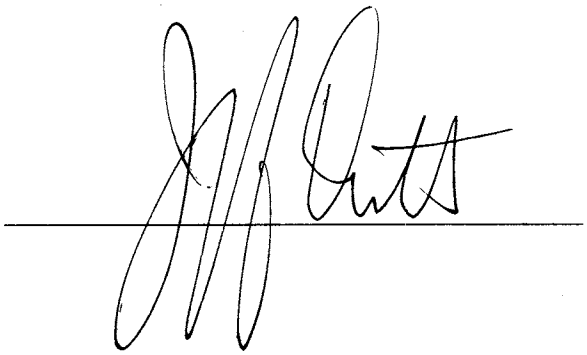

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

NEIL BRETON, an individual, Plaintiff, vs. CLYDE, SNOW & SESSIONS, a Utah professional corporation, and HAL SWENSON, an individual, Defendants.	**ORDER GRANTING DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT AND DISMISSING CASE WITH PREJUDICE** Case No. 090919546 Judge Anthony Quinn

This matter comes before the Court on Defendants Clyde, Snow & Sessions' and Hal Swenson's (collectively "Defendants") Renewed Motion for Summary Judgment. Defendants filed the motion and supporting memorandum on May 12, 2011. Plaintiff Neil Breton ("Plaintiff") filed a memorandum in opposition on June 2, 2011. Defendants filed a reply memorandum on July 1, 2011. On July 27, 2011, the Court heard oral argument on the motion and took the matter under advisement. The Court also held a hearing on August 1, 2011.

Having considered the memoranda and oral arguments related to this motion, the Court now GRANTS Defendants' Renewed Motion for Summary Judgment.

Plaintiff alleges that Defendants, acting as Plaintiff's attorneys, prepared release documents to be signed by 15 individuals who were beneficiaries of a trust of which Plaintiff was a co-trustee. Twelve of the 15 beneficiaries signed the releases and, as consideration for the releases, Plaintiff paid $24,000 to each of the 12 signing beneficiaries. Plaintiff paid no consideration to the three beneficiaries (the Slater Brothers) who refused to sign the releases. The Slater Brothers subsequently sued Plaintiff for, among other things, alleged breaches of fiduciary duty relating to management of the trust.

Plaintiff alleges Defendants should have prepared releases that provided that no release would be effective unless and until all 15 beneficiaries signed a release, and that Defendants should have advised him to not to pay the $24,000 to any beneficiary until all 15 had signed. Plaintiff claims that, as a result of this alleged negligence, he suffered injury and damages in the form of attorneys fees incurred to defend the Slater Brothers' lawsuit, together with additional sums he paid to the Slater Brothers' to settle that lawsuit.

The Court determines as a matter of law and undisputed fact that the alleged conduct on the part of Defendants did not cause the alleged injury. Defendants could not possibly have forced the Slater Brothers to sign the releases. Moreover, it is undisputed, based on Plaintiff's own testimony, that Plaintiff was fully informed and aware, when he paid $24,000 to each of the twelve beneficiaries who had signed releases, that the Slater Brothers had not signed any release and were still free to sue Plaintiff. Therefore, the alleged failure to advise Plaintiff of something

he fully understood did not cause the alleged injury. Plaintiff's own decision (made in connection with his brother) to pay $24,000 to each of the signing beneficiaries without first obtaining releases from the Slater Brothers was an independent and intervening cause of the alleged injury. *See, e.g., Harline v. Barker*, 912 P.2d 433, 439, 446 (Utah 1996) (affirming summary judgment in legal malpractice case and concluding that client's own decisions were intervening cause of alleged injury).

For these reasons, and for the reasons stated on the record at the hearings on this motion, the Court hereby GRANTS Defendants' Renewed Motion for Summary Judgment. Plaintiff's claims are hereby DISMISSED in their entirety, with prejudice.

Dated this 16 day of ~~August~~ Sept, 2011.

BY THE COURT:

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

Anthony Quinn
Third Judicial District Court Judge

APPROVED AS TO FORM:

EISENBERG & GILCHRIST

Jeffrey R. Oritt, Attorney
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of August, 2011, a true and correct copy of the ORDER GRANTING DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT AND DISMISSING CASE WITH PREJUDICE in Case No. 090919546, was served upon the following parties by hand-delivery and by email to:

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Attorneys for Plaintiff

050505473

CASE NO. 090919546
DEPT. SALT LAKE - #W33

IN THE THIRD DISTRICT COURT IN AND
FOR SALT LAKE COUNTY, STATE OF UTAH

----ooOoo----

NEIL BRETON,

Plaintiff,

vs.

CLYDE SNOW & SESSIONS,

Defendant.

TRANSCRIPT
OF MOTION FOR
PARTIAL SUMMARY JUDGMENT

BEFORE THE HONORABLE ANTHONY QUINN
DISTRICT COURT JUDGE

WEDNESDAY, JULY 27, 2011
12:57 P.M.

APPEARANCES:

For the Plaintiff: JEFFREY ORITT, ESQ.

For the Defendant: MAX WHEELER, ESQ.
KEITH CALL, ESQ.

Transcribed by: Mary Beth Cook, CSR, RPR

THIRD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

WEDNESDAY, JULY 27, 2011
12:57 P.M.

* * *

PROCEEDINGS

* * *

THE COURT: We're here today on a motion for partial summary judgment as it relates to causation in this case. Let me share with you some of my thoughts and then give you a chance to respond.

The causation analysis really breaks down, as I see it, to three separate issues. The first issue is whether, based upon the record in this case and particularly the affidavits of the Slater brothers, does the economic incentive theory of causation fail as a matter of law. Secondly, was any chain of causation broken by Mr. Breton's decision to distribute the funds to the 12 beneficiaries that elected to sign releases prior to receiving releases from the Slater brothers. And, finally, was Mr. Breton's losses solely caused by his breach of duty as a trustee prior to the engagement of Clyde Snow & Sessions. I'll talk a little bit about each of those issues.

I think the one that has received the most attention in the briefing is this idea that the Slater brothers' affidavits which protest that the decision of the

other 12 beneficiaries to sign releases had nothing whatsoever to do with their decision to file suit in I think it was the year 2007. I analyzed this with the help of two legal principles. First of all, the first legal principle is the causation in negligence cases is considered to be highly fact-dependent, and summary judgment is rarely appropriate on the issue of causation in negligence cases, only where it's absolutely clear. And, second, even where the facts are not in dispute, if conflicting reasonable inferences can be drawn from the facts, then summary judgment isn't appropriate.

There really aren't very many facts in dispute in this case. To the extent that there are questions of fact, it comes from conflicting inferences that can be drawn from those facts. It really comes down to whether or not those inferences are reasonable or not, and I think that that's where the dispute on this issue primarily lies.

I think that there are reasonable inferences that can be drawn from the facts that would preclude summary judgment in this case, and among those inferences are, I think, number one, the fairly reasonable and obvious inference that the start of any litigation, including the litigation arising out of this trust that was brought by the Slater brothers, there would have to be some cost-benefit analysis undertaken. And one of the things that you consider in making that cost-benefit analysis is what's the upside,

and it's pretty obvious that the upside is greater if you have at least a claim to the entire trust rather than just 3/15 of the trust.

Secondly, as a simple historical, chronological matter, this case -- the case in California was not brought until after the attempt to reach a global settlement and after 12 of the beneficiaries had signed off on the release, which I think gives rise to a reasonable inference that there was some cause and effect there. It's not absolutely certain by any means, but I think it's reasonable to draw the inference that the fact that 12 of the beneficiaries had signed off on the release was a factor in the case being brought.

Of course, on the other side is the absolute protestations from Mr. Wilson and from the Slater brothers that this had nothing to do with their decision to bring the case. Again, I think that there's a reasonable inference that can be drawn that they're pretty interested in making Mr. Breton's life miserable. There's a history of animosity between these parties that casts some doubt. Of course, we don't decide credibility on summary judgment, but I think it would be unwise to completely accept those affidavits without taking that into account in some fashion.

And so what it really comes down to is, are the inferences which I articulated are they speculation, as

suggests in the reply brief filed by the defendant, or are they reasonable inferences, and I sort of tend to come down that they're reasonable inferences.

The second issue is does the fact that Mr. Breton elected to distribute funds to the 12 beneficiaries and accept their releases without getting the release from the Slater brothers does that end up becoming, in fact, the cause of the problem that ultimately occurred here.

I find this a little closer case because it's absolutely clear that Mr. Breton knew that he did not have releases from all 15 at the time that he began that distribution. What is not clear is whether he -- in a sense as I read the record, it sounds like he thought that he was going to get releases from the Slater brothers, and ultimately did not get releases from the Slater brothers.

And it comes down to what he knew at that point in time, whether he knew that distributing those funds would, in fact, make the all-or-nothing global settlement that he contemplated impossible, and it's just not clear to me from the record that I can decide that as a matter of law.

And finally the issue of whether his own breaches of duty as a trustee is the sole cause of what ultimately happened in this case. I think at the time that he went and saw the lawyers at Clyde that he was aware, at least there were being suggestions made, that he had breached his

fiduciary duty, and that's part of why he sought legal advice. He was seeking protection from any possible claims, and so I tend to discount that as being the sole cause in the case.

So I guess after all that, I think that maybe summary judgment isn't appropriate in this case. I think that the defense has certainly pointed out that there's huge obstacles to overcome in proving causation in this case, but at least at this point I'm unconvinced that I can resolve that as a matter of law. But I'll give you a chance to change my mind, Mr. Wheeler.

MR. WHEELER: Thank you, Your Honor. That's all we ask.

I agree with Your Honor that the facts here are really not in dispute, at least those that are material. In the response, plaintiff nitpicked some of the language and so forth of our statement of facts, but nothing that really goes to the heart of the issue.

And the issue here I think that Your Honor should focus on is whether the plaintiff can produce admissible evidence upon which a jury could conclude that but for the work performed by the Clyde Snow lawyers the Slater lawsuit would not have been filed. I mean, that's the real issue. If the evidence is insufficient to prove that but for the work performed by the Clyde Snow lawyers that the suit would

got out of the car and was assisting other people in the wreck area when other cars came and ran into the back of the cars that had already been crashed. He found himself going over the railing and was severely injured when he went over the railing at the freeway.

He sued the drivers of the cars that ran into the backs of the other cars during the snowstorm claiming that they were negligent and that their negligence proximately caused his injuries. Nobody saw what happened to him. He could not remember what happened after his injuries. He didn't know what happened to him. All he knew is he woke up with injuries in the hospital.

The Court of Appeals first of all ruled that it is appropriate for a lower court to grant summary judgment where there's only speculation as to what happened, and in that case the plaintiff relied solely upon the fact that he was there in the accident -- at the accident scene. There were cars running into other cars; that he was thrown over the guardrail and was injured, and so he sued the drivers of the cars that ran into the other cars. The Court of Appeals affirmed a grant of summary judgment in that case on the grounds that it was speculation to assume that these drivers, simply because they were in a wreck and that he was a part of that wreck, caused his injuries because there was no specific eyewitness to what had happened.

have been filed anyway, then I think summary judgment is appropriate.

I recognize, Your Honor, that there are cases that hold that proximate cause is normally a jury question, but there are numerous cases -- and we've cited a lot of them -- that hold to the contrary and have granted summary judgment on proximate cause where, one, the evidence is so overwhelming on one side that no reasonable person could come to a different conclusion, and on the other side where the evidence is so speculative that it would be pure speculation for a jury to consider the evidence and draw inferences as the plaintiff wants them to. So those are the two extremes that the Utah Supreme Court has articulated that Your Honor and any trial court viewing a motion for summary judgment must consider.

We think that we fit into both of those, and I would like to focus on three cases that we've cited, Your Honor, because I think they answer many of the questions that you have raised here. The first is Clark versus Farmers Insurance. We cited that in our brief. This is a case where the plaintiff was involved in a chain-reaction accident up in Farmington on the freeway where Mr. Clark was involved as a passenger in one of the cars that was involved in this massive wreck during a snowstorm. He was unhurt initially when the car he was riding in impacted with another car. He

Now, he had, I think, as good an argument on circumstantial evidence that these drivers caused his injuries as the plaintiff in this case. He was at the scene. There were accidents that the Court assumed that these drivers were negligent that ran into the other cars, and yet notwithstanding all of those circumstances that gave this plaintiff a significant argument that it had to be that negligence that caused his injuries, they affirmed summary judgment.

Even closer in point, Your Honor, is the case Triesault versus the Greater Salt Lake Business District, and I think this is one -- and I think, Your Honor, I request that you read these cases before you make a final decision against this motion, if that is your inclination, because they are very instructive. In this case the plaintiff hired a development company to assist them in the construction and starting up of a movie theater in Spanish Fork. The development company assisted in getting small business loans and setting up the business and doing their studies and so forth and so on. The movie theater was set up and became profitable.

Shortly thereafter, the same development company was retained by a competitor movie theater who wanted to set up a theater in Payson, ten miles away from the first theater, and assisted that theater in setting up the Payson

theater, after which immediately after the Payson theater started up the theater in Spanish Fork became unprofitable.

It was in the same market -- the Court found it was in the same market; that the impact, the lack of profitability, came immediately after the opening of the Payson theater. The plaintiff argued that these circumstances -- the circumstantial evidence they argued was proof that the second theater destroyed the business of the first theater, and they sued the development company for breach of fiduciary duty and conflict of interest since they represented both theaters.

The Court of Appeals said this. They pointed out that there was no evidence, other than the circumstances that the plaintiff argued, to show that the damage caused, namely the unprofitability of the first theater, was caused by the opening of the second. Plaintiff relied solely on those circumstances and the inferences to be drawn. And this is what the Court said: Triesault argues that Deseret's assistance to the Payson theater caused his loss. However, this claim is based simply on the timing of the opening of the Payson theater and the coincidental drop in revenues at the Spanish Fork theater. As a result, Triesault's claim would require a jury to engage in rank speculation to reach a verdict.

THE COURT: It seems to me that this case is a

kind of a discrete issue; is this claim going to be brought or is not going to be brought, and nothing changes with respect to that except -- there's absolutely nothing you can point to that changes -- that you would point to Mr. Wilson getting involved and offering to pay for it.

MR. WHEELER: And the law firm doing an investigation of the facts.

THE COURT: So, I mean, that's equally as reasonable as an explanation. I tend to discount the idea that money could have been obtained from any number of relatives prior to the time. That would be pure speculation, but I have a hard time concluding that with respect to what initiated this dispute that it's not a reasonable inference, and that's what it really comes down to, is a reasonable inference that this had something to do with it.

MR. WHEELER: Well, Your Honor, I think it would be helpful if you look at Exhibit 10 to our memo as well which is the demand letter that the lawyers for the Slater brothers sent to Mr. Breton making a demand for payment. This was prior to the filing of the lawsuit, and it sets forth the facts and allegations that they deem to be material to a claim against Mr. Breton. And they go through in some detail about the findings that they have made with respect to his conduct as a cotrustee of the trust. They make allegations of breach of fiduciary duty and other malfeasance and make

little different because what we have is allegations of misconduct essentially between the years of 1989 and 1993, if I remember correctly, and then we have one of the Slater brothers reaching his majority around 1998. So you have a period of 15 years where, notwithstanding nothing changed with respect to the trust and no information was gained with respect to any breach of duty by Mr. Breton, for 15 years nothing happens. No claim is brought. And then something does change, and what changes is 12 of the beneficiaries give up their -- any claim to the trust, and within two years after that you have this claim brought.

Now, that isn't solid proof of causation, but it seems to me that there is a reasonable inference of causation that can be drawn from that chronology alone.

MR. WHEELER: Well, here again, to rely on the language of the Triesault case, there the same situation occurred. I mean, you have a sequence of events that occur one after the other, and the inference clearly could be that the first theater's business was destroyed by the opening of the second. I don't see that the facts of this case are all that better. They're not as good as that. I mean, the Triesault case --

THE COURT: There's all kinds of vagaries in business. There can be lots of reasons, I suppose, why theaters are successful or not successful, but here we have

the statement in there that the Slaters were shocked or dismayed by what they discovered.

And so to answer the first question you raised is what new happened, what new happened is that they were able to hire a law firm to conduct a due diligence examination and investigation, and they were shocked at what they discovered, according to this letter, what they discovered Mr. Breton had done as a trustee of their trust. So they learned these facts for the first time after they were able to hire a lawyer.

Now, we're not denying that the attempt to get them to sign a release was a catalyst in focusing on the conduct of Mr. Breton and this trust, but the fact that it's a catalyst that causes them to focus and decide to go to a lawyer and see what really happened doesn't help the plaintiff on his proof of showing proximate cause. And so there were disclosures made after the lawyers got involved that the Slater brothers, according to that letter, were unaware of before they went to the lawyers. So there was something new.

And in the petition -- and this is another fact, Your Honor, that we keep getting puzzled with in these pleadings. There's nothing in the pleadings, there's nothing in Exhibit 10, in the demand letter, that ever makes a claim that the Slaters are claiming that they are entitled to more

than their fair share.

THE COURT: The petition isn't clear on that respect, and, in fact, the petition names all the other beneficiaries which suggests maybe to the contrary, but on this record we have the testimony of Geraldine Lyle (phonetic) who says on page 85 of her deposition the Slater boys took the position that they were the only three remaining beneficiaries of the trust and therefore were entitled to the entire rest of the trust.

In addition to that, we have the exchange that took place with the attempted rescission which apparently prompted an angry and emotional response from the Slater brothers' counsel.

MR. WHEELER: How is that admissible, one lawyer interpreting the meaning of another lawyer being upset?

THE COURT: How's it not admissible? It certainly wouldn't be hearsay because it's not being offered for the truth.

MR. WHEELER: Because there's no basis upon which one lawyer can interpret the meaning of others. They can testify as to what was said. They can't testify as to what that meaning is. I mean, if you get angry with me, I can't attribute a motive or a meaning to you unless you tell me it. And there's nothing that was said that discloses that the Slater lawyers thought that that was somehow going to hurt an

made whole.

MR. WHEELER: This is all speculation because the petition doesn't say that, Your Honor. It does not say that. It makes -- it recites what happened with respect to the other beneficiaries and argues that that is a sign of bad faith by Mr. Breton because he's trying to buy off the beneficiaries in order to hide his misconduct. That's the allegation of the petition.

And the other beneficiaries are named because they would be indispensable parties if they had not waived their rights to the trust and agreed to terminate the trust, which is what they did. They agreed to terminate the trust which was what the Slater lawsuit tried to do as well. And, of course, they had to be named because if there was some question as to whether they still had to give their consent to a termination of the trust, then that had to be litigated. But that doesn't mean that the Slater lawyers thought that they would get more than their --

THE COURT: The fact that the other beneficiaries were named I think that's a good fact for you, not a bad fact for you. I'm sorry if I didn't express that. I think the fact that the other beneficiaries were named goes against the idea that at the time of filing the petition they thought they were entitled to 100 percent of the trust's assets.

MR. WHEELER: So I submit, Your Honor, that to

argument that they were entitled to 100 percent.

And besides, Your Honor, we're talking about a trust that was without value. There was no value in this trust, so if the Slater lawyers thought that the Slaters were entitled to 100 percent, 100 percent of nothing is nothing.

THE COURT: 100 percent of the claim for breach of fiduciary duty is better than 3/15 of a claim for breach of fiduciary duty.

MR. WHEELER: But there's nothing in the petition, Your Honor, that argues that they thought they were entitled to collect damages that would have belonged to the other beneficiaries. How could they possibly make a claim -- the only asset the trust had was a claim against the trustees. I think everybody is in agreement with that. But how could anybody make a claim that they are entitled to more than the damage that was caused to them by the conduct of the trustees? It's legally impossible for them to claim damages that belong to somebody else. I mean, could they offer evidence that the other trustees were damaged in such a way and therefore they're entitled to collect for that? No, they couldn't do that.

THE COURT: You mean there's no way to make a claim that the trust itself should be made whole and therefore you'd be entitled to what -- the remaining beneficiaries would be entitled to what 100 percent of the trust after it's

allow an inference that somehow the lawsuit was designed to collect more than the damage that was actually incurred by these three Slater brothers is pure speculation. There is absolutely no evidence --

THE COURT: Except for what Geraldine Lyle says in her deposition.

MR. WHEELER: But the pleadings state -- maybe that's what she thought they were going to do, but the pleadings don't say that, nor does the demand letter. The demand letter makes no reference whatsoever to the Clyde Snow papers, absolutely nothing.

And so let me ask this question, Your Honor. How can the plaintiff possibly prove that had the Clyde Snow lawyers prepared different papers, okay, all or nothing, an all-or-nothing agreement or some other condition that they think would cure the so-called malpractice here, what evidence can they produce that those changes would have caused the Slaters not to file a lawsuit? The Slaters simply refused to sign a release. They didn't say we're not going to sign a release unless you put something else in the papers, or we would sign the release if you put this in the papers.

THE COURT: I think that the ambiguity of the release I think that's a nonissue because if they had all signed it, it would have worked. And regardless of what you

put in the release, if they don't all sign it it's not going to work.

MR. WHEELER: Right. And the plaintiff knew that they hadn't signed and wouldn't sign. Yes, they tried to get them to sign afterwards, and what they got was a counteroffer that they would settle for 66,000 which is what their 1/15 pro rata share of the $1 million trust was supposed to have contained at the time of Saul Breton's death which is again proof that what they were after is their damage, what they personally -- their 1/15 times three for the three brothers.

It certainly makes no sense that they could argue, absent something in the pleadings that could have been produced, that they were asking for more than their pro rata share of damages. There's simply nothing except the speculation of Mr. Breton and his lawyers that that's what they were trying to do.

Let me get to another point, Your Honor, which I think is important and which you raised. Let me go to the Harline case, which is a Utah Supreme Court case where the plaintiff sued two law firms. He had filed bankruptcy, and he filed -- he hired one law firm to prepare the filings for the bankruptcy court. He signed the schedules of property and debts and so forth prepared by the lawyers. The bankruptcy court made a finding that those schedules were fraudulent and did not disclose all of his assets and failed

resulting injury to the client is required as one of the elements. Proximate cause -- and this is important -- proximate cause is that cause which in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred.

So here we have the rule that the proximate cause evidence has to show that but for the negligence of the lawyers the damage would not have occurred, and in this case that means that but for the papers prepared by the Clyde Snow lawyers, and if there was malpractice the malpractice, but for that malpractice that the Slaters would not have sued. That's what they have to prove, and they don't have evidence of that. And more importantly --

THE COURT: I think I'm really more focused on the allegation that Mr. Breton should have been advised that if he were to pay the 12 beneficiaries without getting a release before getting the release from the Slater brothers his all-or-nothing goal of a global settlement was in jeopardy.

MR. WHEELER: Your Honor, there's absolutely no case cited by the plaintiff here that a lawyer has to tell a client what is obvious to everybody on the street. Mr. Breton knew he did not have releases signed by the Slaters. There's no question about that. Your Honor stated that a minute ago. He knew that he did not have releases

to disclose other material facts.

Mr. Harline, after being denied discharge of his debts because of false filings, fired the first set of lawyers and hired a second set and sued them because they had not amended the fraudulent schedules. The Supreme Court, first of all, granted summary judgment with respect to the first set of lawyers, and let me read some things that the Supreme Court said. Justice Zimmerman was writing the opinion for the unanimous court. Harline's lawyers made the same argument that Your Honor has reiterated here, that proximate cause is an issue for a jury that should not be decided on a summary judgment motion, particularly in a malpractice case, attorney malpractice case.

And this is what the judge said with respect to that: As a preliminary matter, we address the question of whether a judge or a jury should decide two issues relating to proximate cause in legal malpractice actions. These issues are common to both appeals before us, and so they join in the appeals. Harline first contends that proximate cause issues inevitably raise jury questions and always preclude summary judgment. Then he goes on to state that there are fact issues and so forth. And Justice Zimmerman writing says we disagree with both contentions.

And then he goes and he states the rule. He said, A causal connection between the breach of duty and the

from those three brothers. He knew that they were the ones most likely to sue him because this animosity had gone on for years before that. As Your Honor indicated, it was probably because of that animosity that he went to Clyde Snow in the first place to try to get releases from those people in particular so he wouldn't get sued for breach of fiduciary duty.

So we're dealing with a situation where the lawyers' advice to him would have been something that would be obvious to anybody. That is, if you pay out this money to the other beneficiaries, you are still not protected from a lawsuit by the Slaters because they have not signed a release. He knew that.

THE COURT: So is it your position that I should just assume that he connected those dots because any reasonable person would? Is that what it really comes down to?

MR. WHEELER: I think -- let me read what the court says here. I think that is one of the prongs that you can rely on in granting the motion. The Supreme Court said -- Mr. Call has just handed me the transcript of Mr. Breton's testimony. I asked the question: "Well, common sense tells you that if they hadn't signed a release there's nothing to stop them from suing you, correct?

"Answer: If that's their intention, yes."

I mean, he acknowledges that he knew that they could sue him. And let me read out of the Harline case again. It says, Contrary to Harline's first contention then, proximate cause issues can be decided as a matter of law when a determination of the facts fails on either of two opposite ends of a factual continuum. Thus, summary judgment is appropriate, one, when the facts are so clear that reasonable persons could not disagree about the underlying facts."

I think this is one of those that fall in that end of the spectrum. It is so obvious that if somebody doesn't sign a release that they can sue you that that is something that is so obvious that reasonable persons could not disagree on that about the underlying facts or about the application of the legal standard. And, two, when the proximate cause of an injury is left to speculation so that the claim fails as a matter of law.

When the court goes on and it talks about intervening causes, I think it answers one of your points that you raised because there are several intervening causes here that I think are critical to this case. After the judge granted a motion for summary judgment as to the first team of lawyers who prepared the false submissions to the bankruptcy court, it went on to decide whether failure to amend by the second set of lawyers was actionable potentially, and they went on and said, yes, if the second set of lawyers failed to

amend the schedules, a jury might have concluded that a different result would have occurred, and his debts might have been discharged. And so that is a question we can't resolve on a summary judgment motion. Then the court went on to say that the evidence indicates that the plaintiff voluntarily made the decision not to amend, and therefore that decision precludes a finding of proximate cause because there's the intervening cause of the plaintiff making a decision that leads ultimately to his or her claimed damage. And that's what happened here.

Let me read the language here because it's very important. "The evidence demonstrates that Harline chose not to pursue his available legal remedy of amending his statement of affairs and schedules prior to his bankruptcy discharge hearing in August of 1988." And this is the important language. "We do not believe it would be a wise judicial policy to allow one party to create legal liabilities in another by voluntarily exercising the complaining party's own personal business decisions." And then it lists a string of citations where the decision by the plaintiff destroys the chain of proximate cause, and it is a subsequent intervening cause that the Court talks about in the beginning when it states that the language is what proximate cause means.

Now, what intervening acts occurred here? What independent business judgment did Mr. Breton make that destroys their claim against the Clyde Snow firm? One, Your Honor referred to it, and that is he made a decision to distribute $24,000 to the 12 beneficiaries who had signed releases. He made that decision. There's no dispute about that. He admitted that. Now, he claims, well, they should have -- and you mentioned this. The lawyers should have told him not to do it. Well, the same argument can be made in the Harline case. When the plaintiff there said I don't want to amend, the lawyers should have said, based on Your Honor's comments, well, you shouldn't do that, that's a bad decision. They didn't tell him that, and that was not raised as an issue in the appeal. It makes no difference. The plaintiff, the client, made the decision, and whether it was right or wrong is the client's issue.

Then it goes on -- then we go on. Secondly, his business judgment, and this is all admitted in his deposition, he rejected an offer to settle this case for $66,000 for each of the three Slater boys. He could have settled this case for $66,000 each, and there's a written document in our exhibits where that formal offer was made, and he admitted in his deposition he rejected it.

The third independent decision that he made which was a business judgment fits within this language of the Harline case was that he elected to spend, according to his numbers, almost a million dollars litigating this Slater lawsuit, and ultimately settling for more than he could have settled it for before the lawsuit was ever filed by paying $225,000 to the three Slaters. Another independent business judgment that he made that is an intervening cause between what the lawyers at Clyde Snow did and what the ultimate damages he claims are.

Finally, he elected to manage the trust as a co-trustee in a way that gave rise to allegations that he committed breaches of his fiduciary duty and committed other bad acts as a trustee in violation of California law, which are the allegations of the petition.

So he has intervened in this situation at least in four major ways along the way. He also elected not to tender the defense to the law firm. He did not inform them of what he was doing or ask them their opinions as to which decisions he ought to make. He made these decisions and then handed the bill to the Clyde Snow firm and said, okay, I made all these decisions, I decided to litigate this case for a million dollars, now I want you to pay for the decisions I made. That's not right, Your Honor.

Those are all intervening causes that destroy the chain of proximate cause to the damages that he's asking for. At the very least, those damages ought to be limited to the offer to settle for $66,000 each. The very least if Your

Honor's correct on all the other proximate cause, he made an independent business decision to litigate and reject that offer without involving the law firm.

Now, I submit, Your Honor, common sense tells you you cannot do that. You cannot, without involving the defendants that you ultimately sue in the decisions, make decisions that incur huge expenses in litigation and never give them an opportunity to say yes or no or to intervene or to do anything else, and then hand them a bill and tell them to pay it. It's not right. It's not in accordance with the law, and I submit, Your Honor, that it's not appropriate here, and I submit that his decisions along the way destroy that chain that has to be maintained for them to collect the damages that they are asking for here.

THE COURT: All right, thank you, Mr. Wheeler.

MR. WHEELER: Thank you.

THE COURT: Let me hear from Mr. Oritt.

MR. ORITT: Thank you, Your Honor. As the Court may imagine in light of your opening comments, I'm going to skip through the opening part of my argument where it's going over all of the facts and the reasonable inferences because I think the Court has outlined them. I may do a quick summary, but I think it may be more effective if I respond to the points that Mr. Wheeler has raised, the arguments he's made anyway, and then the three points the Court -- the three

petition in which the Slater brothers named the 12 other beneficiaries as respondents, and I suspect it's because they were concerned that their argument that the rescission were invalid would be denied.

But what's very important about the amended petition, there is language in the petition, I believe, that indicates that the Slater brothers believed they had 100 percent interest. But in the amended -- first amended petition, which is Exhibit 8, it couldn't be clearer indeed under Roman numeral 1, jurisdictional facts, Paragraph 2, the Slater brothers say, Petitioners name respondents, that is the 12 others, for the sole purpose of -- this is page 2 of the amended petition -- for the sole purpose of asking the Court to confirm the validity and enforceability of the respondent's releases and satisfaction of their interest in the trust as set forth (inaudible) Section 2 below. Well, obviously they're saying throw out those rescissions, and though don't have any interest.

But then when you look at Roman numeral 2 on page 3, the heading itself says petitioners are the only beneficiaries with any remaining interest in the trust. And then you go to page 14 where Roman numeral 6, Paragraph 58, because petitioners are the only beneficiaries with any remaining interest in the trust, they bring this action on their behalf alone. So in fact, that is the position that

issues the Court made.

First of all, with regard to the cases that Mr. Wheeler cited, in particular the theater case, where that case was simply talking about a chronology, that that was the only evidence in that case that would raise a reasonable inference. And in our case we not only have the chronology, but we have multiple other facts in the record, testimonial evidence, documentary evidence, inconsistencies between the Slater brothers' declarations which were monolithic in their language versus their deposition testimony both this year and in 2008.

So we don't just have a chronology, and we have -- I have summarized that on pages 3 through 6 of our memorandum in opposition. We have 12 different areas of facts that we believe raise genuine issues of material fact and reasonable inferences, so we don't just have chronology, so that case, as the Court noted, is not quite apposite.

The second point I'd like to make is there was kind of an extended colloquy between Mr. Wheeler and yourself about the petition and what's in the petition and the 12 other beneficiaries were named. Well, we need to understand that there was a petition and then there was an amended petition. And Exhibit 7 of our memorandum in opposition is the petition in which only the three beneficiaries, the Slater brothers, were (inaudible). It was the amended

the Slater brothers took in the underlying litigation. And as the Court noted, the petitioners are seeking damages from two of the four co-trustees, Neil Breton and his brother Willie, and presumably -- on the grounds that they wasted the trust through their alleged bad acts, and they want the damages to be what that waste was, which means it goes back into the trust, and you have three beneficiaries, not 15. And that is the position they took, and it's the argument we're making on that point based upon the underlying pleadings.

This is kind of a side point, but counsel said that -- made it sound like it's undisputed that Mr. Breton went to see the defendants to avoid being sued. No, that's not true, and we set it forth in our disputed facts and also additional facts. It was Mr. Breton's siblings who were pressing him to try to resolve this intraextended family schism, and so at their request he went forward. It was not because he was afraid of being sued. That may have been something he had in his mind, but it was to try to resolve these issues and get people speaking again. So I just say that because the presentation was that it's undisputed that he went to see them simply to avoid being sued.

THE COURT: I think it's pretty clear that that was one of his motivations though in putting together this deal. He definitely wanted the release.

MR. ORITT: Yes, I just wanted to say there were other issues, too. And this is along the lines again what the Court was asking counsel. I guess counsel is saying, yes, any reasonable person would know how to connect the dots as far as getting releases and what that would mean. I disagree. Mr. Breton hired Clyde Snow to advise him. He hired Clyde Snow to create the documents that memorialized this plan and wanted it to be an all-or-nothing plan.

Why would any reasonable person know to connect the dots when they've hired counsel to advise them. Why would any reasonable person know that, well, I better not get releases from the 12 while I'm still waiting to try to get releases from the other three when I've talked about this with my attorneys, and they have not -- and they've told me well, yes, they're creating the language that will be all or nothing, and they have not said that's not a good idea, don't do that. And we cited to Hal Swenson's deposition on pages 53 and 54 in which he admitted that he never advised Mr. Breton to wait until all 15 beneficiaries had signed. He did not think that was critical. Well, we think it was critical, but the point is he admits that he didn't advise him. And our position is just as one of the critical aspects of malpractice, and Neil went ahead because he had talked to his counsel and counsel did not say no, no, don't do that, that's problematic.

THE COURT: I've got to tell you, Mr. Oritt, this is really the part of it that bothers me the most from your standpoint, and that is I can't really articulate in my own mind what it is that Mr. Breton did know that he should have been advised of. I think that the record is pretty clear he knew that he did not have the releases from all 15. I think that the record suggests at least that he believed at the time he made the distribution that he was going to get releases from the Slater brothers. It sounds like they were sort of leading him on.

MR. ORITT: Yes.

THE COURT: And he thought that that was the case. Did he not know that if he went ahead and distributed the 24,000 to each of the 12 that if the Slater brothers didn't sign they could still sue him? What is it that he didn't know?

MR. ORITT: What he believed -- well, a couple of things. First of all, he believed that he was being protected by the all-or-nothing language which we believe didn't protect him. That's one of our arguments on the negligence issue. And that if, in fact --

THE COURT: Let me just explore that with you. Because even if -- the releases that he had, had they been signed by all 15, would have been fine. They would have worked.

MR. ORITT: Right, all 15.

THE COURT: And the language that you're suggesting if it had only been signed by 12 wouldn't have worked.

MR. ORITT: What I'm suggesting is that if there had been clearer language about this truly being all or nothing, then if only 12 signed and after the leading-on had happened and the Slater brothers ultimately said, no, we're not going to sign, then there wouldn't have been a deal, and there would have been a need -- those other releases would not have been valid, and the money would have had to come back. That's the argument we're making, because the language that should have been in there should have indicated that if all 15 don't sign, the deal is off.

And as we indicated in our memorandum in opposition, what Mr. Breton testified to is that if that had happened he simply would have gone back to the California probate court that was still open under Saul Breton's trust and proposed the plan before the court. But that didn't happen because of all that did happen, but that's the argument that we're making; that is, if the language had been there and the 12 did sign and the three ultimately didn't sign, the deal would have been off, and things would have been reversed. And then, of course, yes, the Slater brothers --

THE COURT: Did he ever try -- after the Slater brothers stopped leading him on, did he ever go back to the other people and say deal's off. You all knew from the releases that each person had to sign or else there wasn't a deal, and had one of them say, wait a minute, I read this release differently than that. I read it as saying that I just have to sign to get -- that "each" means me, so if I sign I get to keep my money. Did that conversation ever take place or was that ever attempted?

MR. ORITT: To my knowledge that conversation didn't take place or that conversation with --

THE COURT: So how are you worse off based on the language of the release? I mean, it may have worked if he had done what you suggested he would have done had the releases been more clear, may have worked with the releases he had. We just don't know. He never tried.

MR. ORITT: Right, and that's where -- I mean, the defense is saying as far as the allegations we may speculate, speculate, speculate. It is speculative both ways. We can't know because the facts didn't happen that way. We have the facts that are before us, but he wasn't advised by his attorneys. And then after this took place and the deal didn't happen with the Slater brothers, then things were essentially in limbo -- or not in limbo but continued on as the Slater brothers took their path and talked with Uncle Mike and everything else took place from that point.

I don't know what to say other than the fact that on both sides of this, this lawsuit we're in, I guess it would be speculative to say if that had happened then maybe this would have happened, or that should have happened and it didn't. I don't know what else to say other than the fact that those conversations didn't take place and things progressed as they progressed in a mostly undisputed way. (inaudible).

THE COURT: (inaudible) you make me hurt.

MR. ORITT: I'm doing a lot better.

On the seven intervening causes that counsel spoke to, and I guess that goes to -- well, actually I think it's the second of your three issues. It's also the fifth one that counsel mentioned, or the fourth one, I'm sorry, the third of your issues, but I need to speak to those points that Mr. Wheeler said.

We actually just now talked about Mr. Breton's decision to get releases from the 12, and I think I pointed out or I think I've argued that it wasn't an independent business decision. He'd been talking with his attorneys. He was not advised. We have the cite from Mr. Swenson.

The second point, that is, it was Mr. Breton's decision to reject the offer of the Slater brothers to settle for what would be 1/15 of the one million that wasn't in the trust, and, in fact, as we know from the underlying facts

Slater brothers' lead counsel and said I don't want to fight this, what will you take. Well, their demand was for 8 million plus punitives, so what would the demand have been, a million, 2 million, 3 million? Should he have accepted that and then that would have been another independent business decision, I think, that the defendants would have come in and said he never should have settled, he should have fought it.

THE COURT: I sort of analyze the most of those issues differently than Mr. Wheeler, and maybe he'll stand up again and tell me why this isn't right, but with respect to things that happened prior to the engagement of Clyde Snow, I mean, that's just the facts on the ground as they were at the time of the representation was engaged. That's not causally related. Either it's malpractice or it's not. It's either caused by the actions of the lawyer or it's not, but those were the issues as they appear.

And thereafter when it comes to accepting the offer and deciding to litigate and everything happens up to that, I would analyze that under the rule of mitigation of damages. In other words, Mr. Breton has to act reasonably. After the malpractice, if it occurred, he has to act reasonably to mitigate his damages. And we're entitled to second-guess every decision that he made, but we have to second-guess it based upon what was known to him at the time that those

that we've cited was never in the trust even from Mr. Saul Breton's death. So the offer from -- or the counteroffer from the Slater brothers was three times or almost three times what their cousins all received, and that offer, the counteroffer they made, was rejected because it was, in Mr. Breton's view as the co-trustee, was simply unfair to the other 12. I don't know how -- and they don't cite any authority for their argument -- how the defendants can say that's an independent business decision, an intervening cause that wipes away, as we argue, the malpractice, and that the malpractice -- or but for the malpractice the Slater brothers wouldn't have sued.

I guess their argument is, well, you had an opportunity to settle with this counteroffer. Then we take that to its most illogical extreme; what if their counteroffer had been pay each of us $100,000 instead of the 24,000 that each of our cousins received. Would defendant's argument be that you should have taken that, too? Otherwise, it's an intervening cause.

It's actually the same argument, I believe, when they say it's another intervening cause that he elected to fight the underlying case and spend the money on that. Well, what would have happened if Mr. Breton after receiving the demand letter had simply said, or through counsel or directly, had contacted Patty Glazer, their lead counsel

decisions were made to ensure that he acted reasonably. And I don't think I can decide that under a chain of causation analysis, at least not on this motion.

With respect to the one, the decision to pay out the 24,000 to each of the 12, I think that that clearly impacts causation, and that, I think, is maybe your biggest problem in the case.

MR. ORITT: Well, I understand --

THE COURT: We talked about that.

MR. ORITT: Right, and our argument as to his counsel (inaudible) Clyde Snow.

The final -- that was what I was going to say, by the way, prehiring the Clyde Snow, that is the fourth point that Mr. Wheeler made managing the trust that gave rise to allegations. Like you say, that's facts on the ground prior to.

The fifth one, the last one he mentions, is that Neil did not tender the defense of the California case to Clyde Snow. Well, let's remember it's undisputed that when Neil got the demand letter he went to Clyde Snow with the demand letter. Now, Mr. Swenson was having medical issues so he wasn't there. But as we noted in our memorandum, Mr. Wiese met with him, and he showed him the letter, and Mr. Wiese said, well, gee, we don't do anything in California, and we don't really work in this area so let me

see if I can find you some names. And it was some referrals that Mr. Wiese gave to Mr. Breton in his own investigation that led him to hire counsel. So the first point is they knew about it. As far as the --

THE COURT: Did they know he was claiming it was their fault, or did he just say, look, I've got this problem, or did he say you guys caused me this problem, what are you going to do about it?

MR. ORITT: Let me see if I mentioned that. He received the demand letter, and it had the draft petition, so it wasn't just the demand letter. And he went to discuss it, and so I don't know that either Mr. Wiese or Mr. Breton recalled the substance of the conversation as far as, well, this is your fault or it's because of you. We don't have that as an undisputed fact. But the first point is that he brought it to their attention, and they directed him to some people.

The second point is that -- and the defense did not identify any case law on this point and we do. We referenced Mallam (phonetic) and Smith. And, again, I think it goes to mitigation of damages, but there is no obligation on the part of Mr. Breton to tender the defense of the California case to Clyde Snow. As I mentioned in the memorandum, if the lawsuit had been brought in Utah, Clyde Snow would have been able to participate as a third-party defendant. Another problem with

We think we've responded to the Court's second issue of was the chain of causation broken by Neil. Appreciate the Court's analysis of that. And the third issue, that is, loss is solely caused by his breach of duty prior to retaining. We talked about that.

So, Your Honor, in light of all of that, we believe that we have met our burden of raising genuine issues of material fact, and this matter should be -- the motion for summary judgment should be denied.

THE COURT: Thank you, Mr. Oritt. Let me hear finally from Mr. Wheeler.

MR. WHEELER: Thank you, Your Honor. Let me try tc deal with these points one by one. First of all, the petition and Exhibit 8, which is the first amended petition. Counsel reads from petition -- this is Plaintiff's Exhibit 8, which is the first amended petition that he refers to, which is the first time, as he says, that the issue of the releases was raised. That's a significant admission right there, Your Honor, because if it doesn't come to light until down the road in the pleadings, then it must not have been a motivating factor in filing (indiscernible) in the first place.

THE COURT: When was the first amended petition?

MR. WHEELER: First amended petition is Exhibit 7.

(Overlapping speakers.)

the defendant's argument is giving them a chance to participate unless it's purely financial it would be a conflict of interest if they would be co-counsel in any way representing Mr. Breton on issues that in our view were a result of their malpractice. So I think the argument that he didn't tender the defense is wrong on multiple levels. That's how I would respond to that intervening cause argument.

I think the final point, Your Honor, I would make I think Your Honor covered it on your first issue, that is, the record and especially the Slater brothers' declaration. We've gone after that at length in our memorandum in opposition. In some ways it's quite challenging for the plaintiff when the defendants have the three Slater brothers' declarations that are near identical saying, no, it wasn't economic, no, it wasn't, no, it wasn't, and, of course, that puts at issue their motivation and intent.

And the Court cited the law on that, as we did in our memorandum, and that's what we've tried to do to show with record evidence that, in fact, there are questions of material fact as to their credibility, as to their truthfulness in those declarations. And so we believe that issues of fact and reasonable inferences get us past that barrier on the point of the Slater brothers saying, no, it wasn't the economic incentive.

THE COURT: Seven months after the first petition.

MR. WHEELER: Yes. So seven months passes, but even more if you take the demand letter, which was shown to Clyde Snow when they referred him to the California counsel, that demand letter makes no reference to any interest or claim that Clyde Snow was at fault or that somehow they were going to claim more than their pro rata share of damages. There's nothing in that letter that would suggest that. There's nothing in the first petition to suggest that. So half a year later you see the first appearance of references to the other beneficiaries.

And the part that he read there, petitioner names respondent in this action for the sole purpose of asking the court to confirm the validity and enforceability of the respondent's releases and satisfaction of their interest in the trust as set forth more fully in Roman numeral 2 below. So they refer to Roman numeral 2 to explain what they mean by this.

I submit that that is just as consistent to interpret that to mean we're the only litigants in this case because the others have released it, and if there's any question about that we've named them so that can be resolved. They're not indispensable parties. They don't need to be parties in this lawsuit. They have released their claims and have released any interest in the trust so we don't need to

name them as indispensable parties.

If you go to Roman numeral 2, the allegations there have nothing to do with a claim that they're entitled to additional damages because the other beneficiaries have signed releases. It's in Paragraph 9 it says in an apparent attempt to avoid liability for their mismanagement of the trust and breaches of fiduciary duties, Neil and Willie attempted to buy the beneficiaries' silence. And then they go on and recite the attempt to pay the 24,000 in releases, and then talks about the other respondents accepting the 24 in full payment. It never says anything in there about the Slaters being entitled to more than their pro rata interest for the damages that they have suffered. It's shown here as a bad act by the plaintiff in trying to buy off the beneficiaries so he can hide his malfeasance. That's what the allegation is, and it's in the second petition. It's not even in the first one.

So we think, Your Honor, that the inferences that are drawn there are not reasonable and are pure speculation as to what is intended by that. And I submit that the statement by his California lawyers in effect is no different than if Mr. Oritt says that he thinks that they were trying to collect more than their pro rata share. There's nothing in the pleadings, nothing in the statements of the Slaters or Mr. Larsen that that is the case. They deny it, and so

anything I'm going to decide but it's --

MR. WHEELER: There's nothing in the statement of facts by either side that would justify that conclusion, Your Honor.

THE COURT: Fair enough.

MR. WHEELER: With respect to the intervening cause -- and, Your Honor, I don't dispute or argue with your analysis. That can be analyzed several ways. I analyze it as an intervening cause that changes the situation. But Mr. Oritt's arguments I don't think are valid with respect to what Mr. Breton should have done when he was made an offer to settle with the Slaters for $66,000 apiece.

Number one, I can answer the question that both of the lawyers from Clyde Snow who were deposed denied that they were ever accused by Mr. Breton until this lawsuit was fomenting; that they were ever told by Mr. Breton that they were the cause of the Slater lawsuit. They were never told that he considered their conduct to be the reason why he was having to litigate the case. That was never said during the entire litigation of the case in California. It was only brought up when a demand letter was sent to Clyde Snow long after the settlement of that case.

But to answer Mr. Oritt's questions, what should he have done? He should have allowed the Clyde Snow people to be a part of the decision. He doesn't have to make the

you're asking -- you're going to be asking the jury -- they're going to be asking the jury to draw inferences that are totally contradictory by the only people who really know what the fact are.

Your Honor stated that you thought that there was an attempt being made by the plaintiff to get the Slaters to sign and he thought they would sign. That is not correct, Your Honor. Willie, his brother, continued to try to get the Slaters to sign. It was Willie who was trying to convince the Slaters to sign off and was offering them other benefits and so forth if they would sign, including the extinguishing of the debt that their parents owed to Mr. Breton. So it was Willie that was trying to sign it. We cannot find it right now because it was a surprise to us, but Mr. Call and I both remember that Mr. Breton said he never believed that Willie was ever going to get the Slaters to sign off. It was Willie's futile attempts to get them to sign, but he never believed that it would ever happen.

THE COURT: I can't remember anything specific about that. I just came away sort of with the impression that it sounded like Mr. Breton thought that they were ultimately going to sign. That isn't a linchpin.

MR. WHEELER: I don't think that's true, and if you'd like we can find it in the transcript.

THE COURT: Like I said, it's not a linchpin for

decision as to whether the Slaters get more than the other beneficiaries. He can tell the other beneficiaries, look, the Clyde Snow people caused this problem. I'm turning it over to them with respect to how they want to deal with the Slater claims. How does he know that the Clyde Snow carriers wouldn't have said we don't want to litigate this, we'll pay $66,000 and be done with it. They were never given that chance because they were never told. They were never told or given the opportunity, and maybe they didn't have to do a formal tender of the defense. I think that's the appropriate way to handle it. If you think a third party is responsible for a claim made against you, the proper procedure is to tender the defense to them and their carrier and say you caused this problem, you fix it.

THE COURT: I'm not sure it breaks the chain of causation though. One thing it does do, I mean, if they make that tender and Clyde Snow says, no, we're not interested, it's not our fault, then it's a lot harder for Clyde Snow to come back and second-guess the decisions that were made thereafter.

MR. WHEELER: I agree.

THE COURT: But, you know, you deny yourself the ability -- if you don't give them the chance to participate, you deny yourself the ability to say we did the best we could. It just makes it a lot harder case I think.

MR. WHEELER: For the plaintiff you mean?
THE COURT: Yeah, if you don't tender the defense.
MR. WHEELER: Yes, I agree.
THE COURT: In reference you ought to allow the second-guess.
MR. WHEELER: Your Honor, I would submit going back to the Harline case again that we're talking about here two ends of the spectrum on summary judgment the Court can consider. One end of the spectrum is that the evidence is so clear that reasonable people cannot dispute the conclusions. Let me talk about that first.
They have taken upon themselves in this case the burden of trying to prove what motivated the Slater brothers in filing that lawsuit. That's the burden they've accepted by claiming virtually all of their damages from the litigation of the California lawsuit. And so they have to show by evidence that they have enough evidence that reasonable people could disagree as to why the Slater brothers sued.
In the face of that burden that they have, we have, one, the undisputed history of tremendous animosity between the Slaters and this plaintiff. There was litigation before they ever came to the Clyde Snow firm. The defendant himself in his deposition said that he viewed his eviction of them from their home and putting them out in the street was the

genesis of the lawsuit that was filed against them. He's made claims -- they made claims in their paper that Mr. Slater said that he was going to use his children's lawsuit as retaliation for all that Mr. Breton had done to them, so we have all these motivating factors that are admitted. All of this took place before the Clyde Snow people were retained.
I submit that he is going to Clyde Snow and paying money to lawyers to prepare a release that had to be at least in part a factor to prove that he knew that there was a risk he was going to get sued. If he didn't think there was a risk, why did he go to the trouble? Why did he pay a lawyer to prepare releases if he didn't think there was any chance he was going to get sued? And, finally, you have the sworn testimony of the Slaters that say that this was not a factor.
So in order to agree with their conclusions, you would have to disregard the sworn testimony of four witnesses, the three Slaters and their uncle, all of whom testified under oath, not just in their affidavits. They were deposed, and they testified under oath that the idea that they were going to get 100 percent of the trust and thereby increase their potential damages never entered their mind. That's what they said. You have to disbelieve that.
And I submit, Your Honor, with all of the history that occurred with this defendant and the Slaters prior to

the time they went to Clyde Snow, with the sworn testimony of the Slaters saying it never entered their mind, that it was not part of their decision to sue, the fact that it was not even raised in the demand letter or in the first petition, was not even raised until the second petition demonstrates that no reasonable person could conclude that that lawsuit was filed because they thought that the papers prepared by Clyde Snow gave them some additional damages that they would not otherwise be entitled to. I just cannot see how you can come to that conclusion.
Now, counsel tries to avoid that by arguing the credibility of Breton Slater. That's not appropriate. He has no case authority saying that Your Honor can ignore sworn testimony. And it's a specious argument anyway to say, well, he lied in a letter to Mr. Breton. He doesn't have any evidence that Breton Slater ever lied under oath. He has a statement that was not correct on some totally unrelated issue, and so we ask you to ignore the sworn testimony.
THE COURT: I struggle with that a little bit, too, but I don't think I can ignore the hostility. I'm not going to decide the credibility of the Slaters in ruling on this motion. I think what it ultimately comes down to is, is there a reasonable inference that contradicts their testimony. And if there's a reasonable inference that contradicts their testimony, it doesn't matter if you've got

six witnesses. I don't balance the evidence, I don't weigh the evidence. If there's a reasonable inference that contradicts it, then it's a question of fact, so I weigh against is it a reasonable inference. Do you disagree with that analysis?
MR. WHEELER: An inference of what? What they're trying to do is they're taking the circumstances --
THE COURT: It's a reasonable inference that the reason that the case was brought in 2007 is because the other 12 people released their claims. I understand you disagree with all this, but this is a reasonable inference that it's based on -- it was influenced, at least to some degree, by the fact that the 12 had given up their claims, and so it opened up the possibility of recovering the entire amount of the trust or the entire claim of breach of fiduciary duty rather than just 3/15 of it. Then if that's a reasonable inference based upon the record, then it doesn't matter how many witnesses are lined up against it. It's still a question of fact.
MR. WHEELER: That inference is drawn upon situations and circumstantial evidence that is as consistent with the Slaters' denials as it is with their inference. We're not arguing here about circumstantial evidence that raises -- that is contradictory to the statement of the Slaters thereby raising a fact question. We're talking about

inferences that are drawn from evidence, namely the sequence of events and the history of the Slaters and the plaintiff and so forth. We're drawing inferences from that evidence which is consistent and explained by the Slaters' testimony. They explained all of this why they waited so long, they explain why they didn't file a lawsuit to begin with, they explain all of this in their testimony. And yet the plaintiff is trying to say, okay, well, they say that's what happened, but we think that it's possible to take that evidence and draw another inference from it. That is speculation, Your Honor. If you read the cases, the Clark case --

THE COURT: I understand your position that it's speculation, but you would agree with me, I take it, that if it were a reasonable inference -- and you don't believe it is, but if it were a reasonable inference, then that's a question of fact.

MR. WHEELER: Yeah.

THE COURT: Okay. You've given me lots to think about. Is there something else you want to say? I didn't mean to cut you off.

MR. WHEELER: Your Honor, if you'd like us to find the reference to where Mr. Breton testified that he didn't think the Slaters would ever sign, we can try to find that. If it's not important to you, we won't take the time to

brother when she passes, so that's a problem for me, Your Honor. Later in the week would be probably better, but even then I don't know for sure what my situation is going to be.

THE COURT: Can we set something up tentatively, and I understand if you need to cancel or maybe you could just send Mr. Call.

MR. WHEELER: Are you going to ask for further argument or just announce your decision?

THE COURT: I was just going to announce my decision.

MR. WHEELER: If that's the case, then Mr. Call can be here if you don't need me to respond to anything else.

THE COURT: I'm going to try and read the things that you've asked me to read, and if you can give me the citation -- actually I only have the excerpts from the depositions, so if it's not in one of the excerpts I have, you can find that and get it to me.

MR. WHEELER: We can give your clerk copies from our file of those cases, Your Honor.

THE COURT: Okay, that would be helpful, but I was talking about Mr. Breton's deposition. I only had the excerpts. If you wanted to give me that.

MR. WHEELER: We can do that as well, Your Honor.

THE COURT: If there's anything else you wanted me to look at, get it to me by the end of the day tomorrow.

bother with it. But I would request that you read those three cases in particular because I think Mr. Breton's decision to unilaterally litigate that case without ever informing Clyde Snow that he thought they were responsible, without ever giving them a chance to intervene and to try to settle it, without giving them a chance to accept the offer of the 66,000, it's exactly what Justice Zimmerman was talking about when he said you make an independent business judgment, you cannot pass the bill to your lawyer and say I made these decisions, now you pay for those decisions that I made, which is exactly what we're doing here. Thank you, Your Honor.

THE COURT: All right, thank you. I want to think about this a little bit more. I'm wondering if I can impose on you. I'm going to be out of town for a couple of days starting sort of middle of next week, and I would like to get this decided while it's fresh in my mind. I'm probably not going to have a chance to write something between now and then. Could I impose on you to come back for an oral ruling on Monday at let's say 10:00.

MR. WHEELER: Normally I would, Your Honor, but I have a sister-in-law who's on her death bed, and we expect her to pass at any time, and I don't know where I'm going to be Monday if she passes. I'm going to have to leave town. She's down in St. George, and I'm going to have to be with my

Mr. Oritt, I'm not sure that there is anything.

MR. ORITT: As long as -- I assume counsel (inaudible) provide me a copy of the portion of the deposition they provide you, and then if I think --

(Overlapping speakers.)

MR. ORITT: Your Honor, what time did you want us?

THE COURT: Can we do it at ten?

MR. ORITT: Sure. On this Monday the 1st.

THE COURT: Right. Does that work for you, Mr. Call?

MR. CALL: I'll make it work, Your Honor.

THE COURT: We'll see you then.

(Whereupon, the proceedings concluded at 2:23 p.m.)

TRANSCRIBER'S CERTIFICATE

STATE OF UTAH)
) ss:
COUNTY OF IRON)

I, MARY BETH COOK, A CERTIFIED COURT TRANSCRIBER IN THE STATE OF UTAH, DO HEREBY CERTIFY THAT THE FOREGOING ELECTRONICALLY RECORDED PROCEEDINGS WERE TRANSCRIBED BY ME FROM AN AUDIO AND/OR VIDEO RECORDING FURNISHED BY THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH;

THAT THE FOREGOING PAGES REPRESENT THE COMPLETE TRANSCRIPT OF THE PROCEEDINGS TO THE BEST OF MY ABILITY THAT WERE HELD ON WEDNESDAY, JULY 27, 2011, AND THAT SAID TRANSCRIPT CONTAINS ALL OF THE AUDIBLE TESTIMONY, OBJECTIONS OF COUNSEL AND RULINGS OF THE COURT.

I FURTHER CERTIFY THAT I AM NOT A RELATIVE OR EMPLOYEE OF ANY OF THE PARTIES OR COUNSEL INVOLVED IN SAID ACTION, NOR A PERSON FINANCIALLY INTERESTED IN THE ACTION.

DATED: OCTOBER 31, 2011.

Mary Beth Cook, CSR, RPR

090919546

CASE NO. 090919546
DEPT. SALT LAKE - #W33

IN THE THIRD DISTRICT COURT IN AND
FOR SALT LAKE COUNTY, STATE OF UTAH

----ooOoo----

NEIL BRETON, Plaintiff, vs. CLYDE SNOW & SESSIONS, Defendant.	TRANSCRIPT OF COURT'S RULING

BEFORE THE HONORABLE ANTHONY QUINN
DISTRICT COURT JUDGE

MONDAY, AUGUST 1, 2011
9:56 A.M.

APPEARANCES:

For the Plaintiff: JEFFREY ORITT, ESQ.

For the Defendant: MAX WHEELER, ESQ.
KEITH CALL, ESQ.

Transcribed by: Mary Beth Cook, CSR, RPR

THIRD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

MONDAY, AUGUST 1, 2011
9:56 A.M.

* * *

PROCEEDINGS

* * *

THE COURT: Breton versus Clyde Snow and Sessions. State your appearances, please.

MR. ORITT: Jeff Oritt on behalf of the plaintiff, Your Honor.

MR. WHEELER: Max Wheeler and Keith Call for the defendants, Your Honor.

THE COURT: And you're still with us.

MR. WHEELER: Yes. My sister-in-law did pass over the weekend, but the funeral is not until later this week, so it allowed me to be here.

THE COURT: I'm sorry about your sister-in-law.

MR. WHEELER: She was in bad shape. It was a blessing when she died. She was in great pain. Some people have a hard time dying. I hope I'm not one of them.

THE COURT: There isn't very many that get out of this life easily.

Well, let's turn our attention to this case. I brought you back here for a ruling today. I've had a chance to review the additional materials that you have prepared.

We really talked about four issues. The three issues that I identified or the three categories of issues that I identified. I was urged to also consider a fourth category. Those categories of issues are the first one whether or not the economic incentive theory that has been advanced by the plaintiffs falls on causation grounds as a matter of law. The second is whether or not the decision to distribute the funds breaks the chain of causation. The third was --

MR. WHEELER: Payment of the 24,000.

THE COURT: Right. Essentially all the decisions that were made postsettlement, but there was one other.

MR. ORITT: I think the third one was preretention of Clyde Snow, any actions that may or may not be breach of fiduciary duties, mismanagement and so forth.

THE COURT: That's the four. I really haven't changed my mind on any of them except for the second which is the one that was the most troubling, you might recall, to me at the time of the hearing. We spent a lot of time talking about the first one. I've gone back and reread your causation cases.

I think that really the analysis under summary judgment has tightened up a little bit as a result of the USA Power case that was decided about a year ago that I think refocuses the analysis on whether or not inferences --

reasonable inferences can be drawn. And this is by no means clear, but based upon the chain of inferences that I articulated last time we were together, I think that you can draw reasonable inferences to overcome a motion for summary judgment on causation grounds.

The more I thought about it the less convinced I am about sort of the ultimate inference that you would have to make, which is really the legal decision, about whether or not the release by the other 12 beneficiaries includes the share of damages that the Slater brothers would have been able to receive. The more I think about that the more I doubt that's the case, but I haven't got enough information to decide that as a matter of law.

But the good news from the standpoint of the defendants at least is that I thought a lot more about the second issue, the more troubling issue, which is does the fact that Neil Breton decided to pay the 12 beneficiaries without getting releases from all 15 did that break the chain of causation, and I guess I've come around to the view that it has broken the chain of causation.

In Mr. Breton's deposition this exchange takes place. What he's really saying is that he should have been told that if he didn't get releases from all 15 then he was exposed to the possibility of a lawsuit from the Slater brothers. And I guess the problem that I have with that from

a causation standpoint is that he seems to concede that he already knows that, and how can the lack of that advice be the cause of the injury if he already knew what he would like to have been advised of. This is essentially what -- I'm just reading -- so it's in front of all of us and fresh in our minds, let me read what his deposition says.

This is beginning at the very bottom of page 269. I'm going to start in the middle of an answer, but this is Mr. Breton speaking, and he says: "And they could have easily said you can't distribute any money to anybody until everybody signs, and that would have been the end of the story. I would have been a million dollars richer. We wouldn't all be sitting here. That's not what happened."

And the question then is: "Okay. So one piece of advice that they didn't give you that you think you should have is that they should have told you not to make any distributions unless everybody signed?"

And the answer is: "Absolutely."

And I'm skipping a question. "You previously testified that you and Willie made a decision to distribute the money, not the lawyers, but your complaint is they didn't tell you not to do it; is that right?"

And the answer is: "My complaint is they never said that by doing anything all or nothing you leave yourself exposed to potentially a very -- well, I didn't know how

large the lawsuit would be and neither did I, but you left yourself exposed, and that was again -- this was -- I had no reason to do any of this, consent, release, distribute money, any of that. There was no time frame, no gun to my head. There were 12 more years ahead of me so, yeah, I'm a little upset.

"Question: Well, let me ask you this. At the time you and Willie decided to distribute the money to the signing grandchildren, you knew, did you not, that the Slaters had not signed the releases?

"Answer: At that time I knew they had not signed the releases.

"Question: You knew that without them signing those releases that they were free to sue you?

"Answer: I didn't focus on that at the time, but yes, apparently they would be free to sue me as they did.

"Question: Well, common sense tells you that if they haven't signed a release there's nothing to stop them from suing you, correct?

"Answer: If that's their intention, yes."

And so the more I think about that, how can there be causation if Mr. Breton already knew what he wanted to be advised by his lawyer, what he thinks in retrospect was a mistake not to advise him of.

I've already expressed that I have a lot of

concerns about the ambiguity or the alleged ambiguity in the releases because if everybody had signed this release it would have worked just fine, and if only 12 had signed a more clear release, it would have had the same effect as where we are now.

And I understand the argument that because of the ambiguity in the release it would provide a basis for people to argue if he asked for the money back that they wouldn't have to give it back, but it's admitted that that discussion never happened. He never requested the money back, so we don't know whether the release that the 12 actually signed would have worked or not, would have allowed him to claw back the settlement in the event that all 15 did not sign. There's no attempt to do that anyway.

So it really comes down to what was caused by the failure to specifically advise Mr. Breton that if you don't get all 15 to sign you're still at risk, and you distribute to the 12 you're still at risk for being sued by the other three. And I think that it's so clear in anybody's mind that he was still at risk to be sued by the other three that the failure to tell him that was not the cause of what happened.

I said I wouldn't allow any additional argument, but since Mr. Wheeler is here, I'm going to allow you one last chance to tell me if there's something I'm missing there, Mr. Oritt.

MR. ORITT: Thank you, Your Honor. As I was listening to what you were saying, I think you said among other things the Court thinks that Mr. Breton already knew that if he got releases from the 12 he could still be sued. Yeah, I understand that, but -- and please tell me if I've misunderstood. It also sounded like you were saying or thinking that if Mr. Breton -- or that Mr. Breton seemed to know what he thought his attorneys should have advised him, that is, what was caused by the failure to advise him.

THE COURT: Maybe I didn't say it very well. What I'm trying to say is that he's claiming it was malpractice not to tell him that if he didn't get releases from all 15 that he was still at risk for being sued by the other three, and I'm saying that -- I'm accepting as true that they didn't tell him that. But if he already knew that, then as a matter of law the lawyer's failure to tell him that was not the cause of what ultimately happened.

MR. ORITT: And I think that there's the misunderstanding, and I thought that we had argued this not only in our memo in opposition but also in our argument last week. That is, that it wasn't their failure to advise him that if you don't get all the releases they can still sue you. It was their failure to advise him to not distribute unless he got all of the releases; that had it to be an all or nothing. Don't go through with the plan getting the

releases, distributing the money unless you get all of them. And maybe I'm missing something here, Your Honor. But if they had advised him of that, and Mr. Swenson admitted that he did not advise him of that, he didn't think it was critical, and I think it was, and Neil testified that he did not get advice that he should not distribute which is part of getting release signed and distributing.

THE COURT: It's really part and parcel of the same thing the way I see it. I guess if the complaint was and the facts were that I'm out the money that I paid to the other 12, if that was the theory of damages, then I could follow that, and if he had tried to get that money back and been unable to do it, you could say, well, gee, you should have told me. I shouldn't be giving anybody money until everybody signed because, look, I'm now out 12 times $24,000.

I can see a causation argument may be that that's the cause of that, if he had tried to get it back and hadn't been able to, but it's really the same thing. The way I said and the way you said it amounts to the same thing. He knew, regardless of whether he paid the money or not, until he had all 15 signed he could still be sued by whoever did sign, and that's the ultimate cause of his -- the ultimate suit in the case, the suit that he settled for a million -- with legal fees and everything, it cost him more than a million dollars. In fact, he didn't get releases from all 15.

MR. ORITT: To the tying into the economic incentive theory that you talked about earlier, if he had been advised not that either he had to get all 15 or none, and he couldn't get all 15, then he wouldn't have gone forward with it. And then to follow our argument, there would have been no incentive, and they wouldn't have sued him.

It seems to me what the Court is saying is that -- well, actually I'm not sure what the Court is saying when we're saying if he had been advised, as we allege he should have been, either get all of them or don't go forward with this, and he had not been able to get all of them because the three weren't doing (indiscernible), then he wouldn't have gone forward with it, and as we argued he would have submitted it to the California probate court. That's the argument that we're making. Either that he should have been advised if you go forward with all of it it's over because you get all of it. If you don't go forward with it because you haven't gotten all of them, then, as we argue, there would be no economic incentive for the Slater boys, and they wouldn't have sued him, and we think the reasonable inferences support that. That's what our argument is.

MR. WHEELER: We'll submit it, Your Honor.

THE COURT: I'm going to rule. I'm going to grant the motion for summary judgment on that one ground. I think

that's where I am at this point in time. Mr. Wheeler, would you prepare the order.

MR. WHEELER: We will, Your Honor, thank you.

MR. CALL: Your Honor, may we have until a week from this coming Friday to submit the order. Mr. Oritt (indiscernible) in arbitration this week, and so I'd like to have next week to prepare the order.

THE COURT: Sure.

(Whereupon, the proceedings concluded at 10:11 a.m.)

TRANSCRIBER'S CERTIFICATE

STATE OF UTAH)
) ss:
COUNTY OF IRON)

I, MARY BETH COOK, A CERTIFIED COURT TRANSCRIBER IN THE STATE OF UTAH, DO HEREBY CERTIFY THAT THE FOREGOING ELECTRONICALLY RECORDED PROCEEDINGS WERE TRANSCRIBED BY FROM AN AUDIO AND/OR VIDEO RECORDING FURNISHED BY THE TH DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH;

THAT THE FOREGOING PAGES REPRESENT THE COMPLETE TRANSCRIPT OF THE PROCEEDINGS TO THE BEST OF MY ABILITY THA WERE HELD ON MONDAY, AUGUST 1, 2011, AND THAT SAID TRANSC CONTAINS ALL OF THE AUDIBLE TESTIMONY, OBJECTIONS OF COUNS AND RULINGS OF THE COURT.

I FURTHER CERTIFY THAT I AM NOT A RELATIVE OR EMPLOYEE OF ANY OF THE PARTIES OR COUNSEL INVOLVED IN SAID ACTION, NOR A PERSON FINANCIALLY INTERESTED IN THE ACTION.

DATED: OCTOBER 31, 2011.

Mary Beth Cook

Mary Beth Cook, CSR, RPR

SNOW, CHRISTENSEN & MARTINEAU P.C.

SALT LAKE CITY • ST. GEORGE

July 27, 2011

kcall@scmlaw.com
(801) 322-9144

VIA EMAIL

The Honorable Anthony Quinn
THIRD JUDICIAL DISTRICT COURT
450 South State Street
Salt Lake City, Utah 84114
marianad@email.utcourts.gov

RE: Neil Breton v. Clyde, Snow & Sessions, et al. (Civil No. 090919546)

Dear Judge Quinn:

I have attached excerpts from the transcript of the December 8, 2010 deposition of Neil Breton. We believe the following excerpts demonstrate that Mr. Breton was fully informed that he could be sued and was skeptical that the Slater Brothers would sign releases at the time he and his two siblings released funds to the 12 grandchildren:

p. 120 l. 15 to p. 121 l. 16
p. 122 l. 14 to p. 123 l. 13, esp. p. 122 l. 24 ("I thought it was futile")
p. 184 l. 18 to p. 186 l. 9, esp. p. 186 ll. 4-5 ("I was very leery")
p. 223 l. 12 to p. 225 l. 9
p. 227 l. 20 to p. 230 l. 5
p. 239 l. 6 to p. 241 l. 1
p. 271 l. 16 to p. 274 l. 21

I have also attached a copy of Deposition Exhibit 37, an email from William Breton to Neil Breton, in which William reports that Rhonda Slater told him on January 3, 2005, "The [Slater] kids aren't signing." The funds were disbursed to the grandchildren sometime between January 6, 2005 and February 6, 2006. See Deposition Exhibits 38 and 43, also attached. (These exhibits are discussed in the references provided above.)

I have also attached copies of the following cases:

Triesault v. Greater Salt Lake Business District, 2005 UT App 489, 126 P.3d 781
Harline v. Barker, 912 P.2d 433 (Utah 1996)
Clark v. Farmers Ins. Exchange, 893 P.2d 598 (Utah Ct. App. 1995)

Thank you for your consideration.

Sincerely,

SNOW, CHRISTENSEN & MARTINEAU

Keith A. Call

cc: Jeffrey R. Oritt, Attorney (via email)
Enclosures

CERTIFIED COPY

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * *

NEIL BRETON, an individual,	
Plaintiff,	CIVIL NO. 090919546
vs.	VIDEO DEPOSITION OF:
CLYDE SNOW & SESSIONS, a Utah professional corporation, and HAL SWENSON, an individual,	***NEIL BRETON***
Defendants.	

* * *

December 8, 2010
9:13 a.m.

Offices of Snow Christensen & Martineau
10 Exchange Place, Suite 1100
Salt Lake City, UT 84111

* * *

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gave Hal the information I was able to give him, and he put together a plan, estate plan. Was setting up various trusts and explained how they would operate and kind of gave us an education about estate planning and how we should proceed, and that's how I knew or met Hal.

And we had that relationship for a couple years, and from time to time I think we met occasionally at Hal's office to update or review the estate plans as assets changed and things became clearer in my life in terms of financial situation.

Q Okay. But my question goes to what prompted you to go to Hal or to Clyde Snow with respect to the grandchildren's trust.

A That was just -- it was basically -- I knew Hal. I knew he did estate work, and I believed at the time that he understood our family and that I had this matter that I'd been asked by my other two trustees to try to resolve, a family global dispute, and I went to the Clyde Swenson firm, spoke to Hal about his advice about how we best -- at one point -- at the same time protect me from -- because we had several failed attempts at trying to settle a global -- reach a global settlement, and this was at my brother's and sister's insistence that we get a

lawyer, and I said, "Well, I know somebody in Utah, and since you both don't live in this country, let me talk to Hal and see" -- "explain to him the situation and see if he can put together a document that you can present to Rhonda and her children, and if they accept it, we'll reach a settlement. If they don't, then we'll have spent money on a document that won't go anywhere."

Q I think you said "at the insistence of your brother and sisters."

A Right.

Q Plural.

A That's correct.

Q Was Rhonda insisting --

A No, no. I meant brother and sister. Jana --

Q Sister?

A Yeah. Rhonda had nothing to do with this. It was Willie and Jana.

Q And you said there was a family dispute that was kind of the catalyst for this decision. What was that dispute?

A Well, party -- a few things. One, my mother -- you know, my mother, who we were all very close to, was really being torn apart by the fact

that her family was not speaking for years, and my nephews and I -- my sister had accumulated eight years of birthday presents that we'd mailed them and sent them all back. It was just -- it was just a real family mess that wasn't going anywhere. We weren't going to resolve anything.

Jana had a relationship with Rhonda, but it was strained. Willie occasionally spoke to Rhonda. I didn't speak to anybody in the Slater family, nor were they allowed to speak to me or any of my kids. They disowned all my kids. My daughters, who were very close to their aunt, were basically, you know, removed from any family communications.

And so it was probably partly my mother requesting we try to make a settlement. I know I had a meeting at my -- with my mom and my aunt, with Rhonda actually there, sometime years earlier, and she was crying about, "Why can't we all get this worked out?" And I, of course, explained that her husband is a problem that we can't resolve and work around. And then, of course, my mother was never allowed back in her house, and it just became a really ongoing ugly and uglier family issue that -- this was an attempt -- I thought it was futile, but Jana and Willie offered to try to negotiate, once

again, after several failed attempts at global settlement, and I said, "Look, you two trustees -- I'm only one vote. If the two of you can negotiate a deal that satisfies everybody, I'm willing to give up the judgment," which is a huge gift. That's a quarter million dollars more than anybody else got or was entitled to, and the judgment was still valid. I said, "That's what I'll give up, but I'm not engaging in any communications or writing any letters, talking to anybody. You negotiate it, you make the deal, and if you make a deal, I'll go to a lawyer and have it papered," and that's what I did, given the assurance that they had made a deal.

Q Okay. So, as I understand what you're saying, is that this is a general good faith attempt by you to settle the family feud that has been going on for years, correct?

A It was an attempt by all -- yes, all of us, to -- all the parties.

Q And who was it that came up with the idea that, "Well, let's pay each of the grandchildren some money and see if that takes care of the problem"?

A Jana. Jana was aware that I put money aside in a personal account -- in this account, actually. It was my money. It was about --

A Yes.

Q Which is a number of months after you actually received the letter, correct?

A Well, I told you I wasn't sure when I received the letter, but it was sometime before October of '04.

Q 01.

(Whereupon Deposition Exhibit No. 26 was marked for identification.)

Q (BY MR. WHEELER) Do you recognize this as one of the drafts of Receipt and Release and Consent to Terminate?

A Yes.

Q And this was one of the drafts prepared by the lawyers at Clyde Snow?

A Yes.

Q And describe the procedure, if you would, when -- I see that you sent Willie's letter to Hal Swenson where he explains what he wants in the letter. Did you also provide any information to Mr. Swenson or to Mr. Wiese as to what you thought should be in the letter?

A Yes.

Q And how did you do that? In writing or orally?

A Orally.

Q And --

A As I recall, it was orally, but I don't recall the documents that were written.

Q Tell me, as best as you can recall, what you told Mr. Swenson you wanted in the letter.

A Initially I think it was Mr. Swenson, and then I think at one point it became Mr. Wiese, but I think -- if I -- and I'm assuming this is to Mr. Swenson -- that I brought him up to speed with the family history, I brought him up to speed, I think in great detail, because he explained that in his own deposition, that he understood there was -- he hated my guts, or some term, I think, some phrase that Hal referred to, that there was serious -- he understood, Hal did, that there was serious problems between Mark Slater and myself and that Willie and Jana had been negotiating, for the umpteenth time, to try to find a global settlement, and in Jana's case, as I spoke to you and answered your question earlier, she specifically needed the money, so when she said everybody needed it, she was being a little generous with the facts. She was specifically the only one that needed money.

I tried to accommodate her. As I said,

offered her -- to loan her the money, but she thought if we just distributed the money and ended all of this, she got indication from Rhonda that's what they all wanted, was a global settlement, and I was very leery, but when I met with Hal, I was very clear about, "I have no obligation to do this. I'm not even sure that it will get settled, but if we do it, it's got to be something that all of the trustees are protected. There are no repercussions."

Hal acknowledged that, understood that, and referred to it as "the all or nothing clause," which was critical, totally critical for me to be involved in any of this transaction. And, unfortunately, whatever Hal's best efforts were, he didn't accomplish that goal, and I ended up in a lawsuit.

Q Okay. Tell me exactly how you transmitted the information concerning your family feud to Mr. Swenson or Mr. Wiese.

A Just that there had been years of threats of litigation. I think I maybe even produced some documents. I don't know if I did or I didn't. Some of the letters that I'd seen or gotten. But I made it crystal clear, to use an old expression, that there was about as bad of blood between our families as there could be. Mark threatened to kill me three

writing letters to Rhonda, saying, "Let's bury the hatchet" -- my words, not his -- "and let's solve this family dispute and sign off, and the money is sitting in the account for you," and this goes on for a long time, right?

A Yes, that's correct.

Q So these letters continue, and efforts by Willie, in particular, continue to try to convince Rhonda to get her kids to sign off? Is that fair?

A That's fair.

Q Thirty-eight, CSS.

(Whereupon Deposition Exhibit No. 37 was marked for identification.)

Q (BY MR. WHEELER) Exhibit 37 to your deposition appears to be an e-mail -- may have been --

A It was a fax, maybe.

Q It may have been a fax. It's addressed to you, correct?

A Yes.

Q Is it from Willie?

A No. It's actually -- well, it is from Willie, but it's from -- this says "MBreton," that he was in town at my mom's.

Q I see. That's why the "MBreton" --

nothing,' then the kids decided not to sign, either."

And then she goes on to complain about not seeing tax returns or other information, correct?

A Right. And that she doesn't trust me. She put that in there.

Q Yeah. And that she doesn't like you.

A Yeah.

Q And doesn't trust you.

A Right.

Q So would you agree that, assuming that that's an accurate recording of the conversation, Rhonda thinks this is an all-or-nothing deal that she can kill if she doesn't cooperate?

A Well --

MR. ORITT: I'm just going to object. I don't know that it's a recording, because he says it's a summary, but go ahead. It doesn't matter.

MR. WHEELER: Okay.

THE WITNESS: Yeah. I -- your question, I think, is, does -- I mean, Willie says, "Rhonda, you're saying opposite things. If this was an issue of time, then you should have consulted a lawyer." I mean, her kids had these documents for weeks. I don't know. This was Rhonda being Rhonda, and I really don't know what she intended to say. She made

Q Do you know whose handwriting that is?
A It looks like it's Willie's.
Q Okay. "Aunt Vickie talking"?
A Yeah. That's my mom.
Q Can you read that?
A It just says, "Aunt Vickie talking. Vickie Murdis. Reconfirmed no intent. Speaking on behalf of kids with" -- I don't know what that -- I don't know what Willie's --
Q With the kids' knowledge?
A It says, "With kids' knowledge." I don't know what Willie had in mind with this.
Q That's kind of consistent with what the text says, is that she showed it to the kids and decided --
A Apparently.
Q They all decided not to --
A That's what it appears to say.
Q Let's go to 6717 BRE.
(Whereupon Deposition Exhibit No. 38 was marked for identification.)
Q (BY MR. WHEELER) You recognize this?
A This was sent to me -- well, Formaggio is my wife's -- that's Gail's e-mail addresses, Formaggio49 -- to me, so this is -- and Judy is

Willie's wife.

Q Okay.

A So you see who the players are.

Q I don't understand why there's so many addresses up above.

A I don't know. I -- yeah. It beats me.

Q Getting down to the text, it --

A Neither of them, back in '05, are probably very literate with using computers and texting and everything and -- it's not so simple, but this looks like -- this looks like, to me, like Judy and Gail were speaking. From Willie, though. Oh, no. This has nothing -- this has nothing -- all right. Well, let me explain.

The Kobb bank accounts is a totally different matter. Willie and I own a piece of property in a partnership called Kobb Realty. The 23 and the 76 are our ownerships respectively of that real estate partnership, so my brother and I currently own a property.

Q Okay.

A And so that's the whole Kobb part of this letter, okay? Just so you know, it's nothing to do with whatever else is in -- "With regards to Rhonda's letter, you told me that you'd have the lawyer send a

copy of the draft for my input before mailing it out."

THE REPORTER: Sir --

MR. ORITT: Yeah. You better read that to yourself or read it slower.

THE REPORTER: It's getting harder and harder and harder.

THE WITNESS: I'm sorry. I'll go slowly. I'll just read it to myself so you won't even have to listen.

Q (BY MR. WHEELER) Yeah, just read to yourself. Well, let me read it so we have it on the record. Talking about Rhonda, that's where I want to start, is, "Also, with regards to Rhonda's letter, you told me that you would have the lawyer send me a copy of the draft for my input before mailing it out." Was that the practice, that he wanted to see everything that went out?

A Willie -- I think so, yes.

Q "I'm thinking that since Rhonda's kids' issues will take a bit of time, you will probably want to distribute everything to the early signers and leave $75,000 for the time being." Is that -- that's talking about the 24,000, correct?

A Yeah.

Q And he's suggesting that he wants you to distribute to those that signed and to leave in the account $75,000 to pay the Slater boys, because he thinks they're going to come around later, right?

A Uh-huh.

Q Let's go to 765.

MR. CALL: One more time, please?

MR. WHEELER: CSS 765.

(Whereupon Deposition Exhibit No. 39 was marked for identification.)

Q (BY MR. WHEELER) Exhibit 39, again, is a letter that's unsigned, and it says "not sent," if you'll see there in the handwriting, addressed to Jordan Slater. Do you know how this document came to be drafted?

MR. WHEELER: Are you a little warm?

MR. ORITT: Oh, just as the day goes on it's getting a little stuffy, but I'm okay.

MR. WHEELER: Got to wear you guys down.

THE WITNESS: I got a little -- I got a little left in me. My tank's not empty yet.

MR. WHEELER: Yeah. I'm talking to him, not you.

THE WITNESS: Oh.

MR. WHEELER: It looks like you can go

that he wanted that -- it likely did.

Q And the letter would have come from him, I assume.

A Yes.

Q Let's go to 6720.

(Whereupon Deposition Exhibit No. 43 was marked for identification.)

Q (BY MR. WHEELER) Do you recognize this document?

A Yeah. This -- yes.

Q It's an e-mail to you from Willie, correct?

A Yeah.

Q So at this stage you're starting to use e-mails --

A Yes.

Q -- it appears.

A Disregard the fact that I didn't shoot any geese. Don't -- don't hold me responsible for that. It was a very foggy day.

Q And is he talking about the checks to the signing grandchildren?

A I think he's referring, actually, to what the FedEx -- because FedEx is our tenant in a building. I don't know, but I just -- I saw the word "FedEx" and it just made me wonder.

Q It says, "You'll have the checks by Tuesday afternoon." Which checks is he talking about?
A I think we -- I distribute checks to his account. I manage a real estate partnership, and FedEx is our tenant, so I don't really know if this was -- if these were the checks to the kids, to the Vanguard, because Willie has an account at Vanguard. Oh. It says "the kids' money," so --
Q Yes.
A Yeah, I think it is the checks.
Q When it says that the kids' money arrived, I'm assuming he's talking about his own kids.
A Yes, I think that's correct.
Q So you have made the distribution of the money, and his kids received their share?
A Yes.
Q And he's talking about the checks?
A Yes.
Q Also relating to the children's money?
A Yes.
Q Arriving by Tuesday?
A Yes.
Q Now, the decision to distribute that money was made by you and Willie?
A And Jana. The three of us.

Q And Jana. The three of you together.

Let's go to 6719.

(Whereupon Deposition Exhibit No. 44 was marked for identification.)

Q (BY MR. WHEELER) Looks like we're still getting drafts from Willie here. Do you recognize Exhibit 44?

A Yeah. It looks kind of like the same version as the one he wrote back on January 21st, Exhibit No. 41.

MR. ORITT: Not exactly.

THE WITNESS: Not exactly, but it's similar.

Q (BY MR. WHEELER) Are you encouraging him to try to get this done with Rhonda, or is this something he's just doing on his own?

A He is really operating on his own at this point.

Q Yet --

A I mean, he --

Q You're having your lawyers look at his drafts, correct? Or not --

A At this point, I'm not even sure that -- I don't see anything that -- on these drafts that I even sent them off to anybody. I think he was

Maybe even your firm. So yeah, I was -- I was --

Q Well, you previously testified that you and Willie made a decision to distribute the money, not the lawyers, but your complaint is they didn't tell you not to do it; is that right?

A My complaint is they never said that, "By doing anything other than the all or nothing, you leave yourself exposed to potentially a very" -- well, they didn't know how large the lawsuit would be. Neither did I. But you left yourself exposed, and that was -- again, this was -- I had no reason to do any of this consent, release, distribute money, any of that. There was no time frame that -- no gun to my head. There was 12 more years ahead of me, and so yeah, I'm a little upset.

Q Well, let me ask you this: At the time you and Willie decided to distribute money to the signing grandchildren, you knew, did you not, that the Slaters had not signed releases?

A At that time, I knew they had not signed the releases.

Q And you knew that, without them signing those releases, that they were free to sue you?

A I didn't focus on that at the time, but -- yes, apparently they would be free to sue me, as they

made the distribution, that you had been threatened with a lawsuit by Breton Slater, correct?

A Ten years earlier?

Q Yeah.

A Yeah. When he was 14 years old, I think he threatened to sue me, yeah. I think -- yes, I do recall that he threatened to sue me a couple times.

Q And you knew that they had bitter feelings against you because they thought you had thrown them out in the street when you foreclosed on their house, correct?

A I did not know that until their depositions. I knew they were bitter at me, but that was what came out in the deposition.

Q And you had been in litigation with Rhonda as well that we talked about in some of these other lawsuits where you were adverse to her in cases prior to this, correct?

A Correct.

Q Okay. So you knew that there had been threats of litigations -- litigation against you by the Slaters; there had been written threats; there had been allegations by them that you had mishandled the funds. All of this is true, correct? Prior to the time you distributed the money to the

grandchildren?

A The last communication I got from them was in 19- -- mid '90s, so ten years had gone by. Those threats -- I mean, I -- you know, they were so concerned that, for ten years, I didn't hear another word from them, so I don't know what their thinking was for the next ten years, so I -- I don't want to assume anything about what they were thinking. All I know is what they did.

Q Well, if you were not concerned, why did you make it so abundantly clear to the Clyde Snow people that you wanted to make sure that you were not going to get sued? You said that was your primary objective.

A Just because I'd been in litigation in California. I'd gone through a lot of -- millions of dollars of litigation fees, and I was not interested in inviting a lawsuit that I didn't need to invite, and I had moved to Utah, and that was the last thing on my mind, was to get into further litigation with any of my relatives.

Q What evidence do you have that the Slaters would not have sued you but for the work done by Clyde Snow & Sessions?

MR. ORITT: Well, I'll object to the extent

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(Cite as: 912 P.2d 433)

Supreme Court of Utah.
Wesley G. HARLINE, Plaintiff and Appellant,
v.
Ronald C. BARKER and Larry Whyte, Defendants and Appellees.
Wesley G. HARLINE, Plaintiff and Appellant,
v.
Pete N. VLAHOS and Vlahos and Sharp, a partnership, Defendants and Appellees.

Nos. 940322, 940323.
Feb. 14, 1996.

Client brought two legal malpractice actions against bankruptcy attorneys. The Third District Court, Salt Lake County, Tyrone Medley and Leslie A. Lewis, JJ., granted summary judgment for attorneys, and client appealed. The Supreme Court, Zimmerman, C.J., held that: (1) doctrine of issue preclusion bound client to bankruptcy court's determination that he transferred property with intent to defraud creditors and that he knowingly and fraudulently made false oath and that therefore his discharge had to be denied on those grounds, and (2) client's instructions to his attorneys not to amend his bankruptcy schedules precluded finding that attorneys' negligence proximately caused denial of client's bankruptcy discharge.

Affirmed.

See also, 854 P.2d 595.

West Headnotes

[1] Attorney and Client 45 ⚿129(2)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(2) k. Pleading and evidence. Most Cited Cases

In legal malpractice action, plaintiff must plead and prove (1) attorney-client relationship, (2) duty of attorney to client arising from their relationship, (3) breach of that duty, (4) causal connection between breach of duty and resulting injury to client, and (5) actual damages.

[2] Attorney and Client 45 ⚿105.5

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases
(Formerly 45k105)

For purposes of proving legal malpractice, "proximate cause" is that cause which, in natural and continuous sequence, unbroken by efficient intervening cause, produces injury and without which the result would not have occurred; it is the efficient cause which necessarily sets in operation the factors that accomplish the injury.

[3] Attorney and Client 45 ⚿129(3)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(3) k. Trial and judgment. Most Cited Cases

For purposes of legal malpractice action, question of proximate cause generally raises issue of fact to be submitted to jury for its determination.

[4] Attorney and Client 45 ⚿129(3)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(3) k. Trial and judgment. Most Cited Cases

Proximate cause issue in legal malpractice action can be decided as matter of law when (1) facts are so

clear that reasonable persons could not disagree about underlying facts or about application of legal standard to the facts, or (2) when proximate cause of injury is left to speculation so that claim fails as matter of law.

[5] Attorney and Client 45 ⚿112

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of litigation. Most Cited Cases

For purposes of proving proximate cause in legal malpractice cases by showing that absent the attorney's negligence, the underlying suit would have been successful, the objective is to establish what the result of underlying litigation should have been, which is an objective standard, not what particular judge or jury would have decided, which is a subjective standard.

[6] Attorney and Client 45 ⚿129(3)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(3) k. Trial and judgment. Most Cited Cases

For purposes of proving proximate cause in legal malpractice cases by showing that, absent the attorney's negligence, the underlying suit would have been successful, if only a bankruptcy judge could have decided issues in the underlying suit in the first instance, then malpractice plaintiff is not entitled to lay jury in malpractice action to decide what outcome of underlying suit would have been absent attorney's negligence.

[7] Attorney and Client 45 ⚿129(2)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(2) k. Pleading and evidence. Most Cited Cases

For purposes of determining, in legal malpractice action, whether outcome in underlying suit would have been different but for attorney's alleged negligence, subjective opinion testimony from judge who presided over original case as to how that judge would have ruled absent the alleged negligence of attorney is improper and inadmissible.

[8] Appeal and Error 30 ⚿1050.1(12)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)10 Admission of Evidence
30k1050 Prejudicial Effect in General
30k1050.1 Evidence in General
30k1050.1(8) Particular Types of Evidence
30k1050.1(12) k. Opinions and conclusions. Most Cited Cases

Error in admitting, in legal malpractice suit against plaintiff's bankruptcy attorney, subjective opinion testimony from bankruptcy judge who presided over original case as to how that judge would have ruled absent the alleged negligence of attorney was harmless error where plaintiff failed to show that bankruptcy attorney caused plaintiff's denial of discharge in underlying bankruptcy cases.

[9] Appeal and Error 30 ⚿1026

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)1 In General
30k1025 Prejudice to Rights of Party as Ground of Review
30k1026 k. In general. Most Cited Cases

"Harmless error" is error which, although properly preserved below and presented on appeal, is sufficiently inconsequential that appellate court concludes that there is no reasonable likelihood that the error affected outcome of proceedings.

[10] Judgment 228 ⚿720

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded

228k716 Matters in Issue
228k720 k. Matters actually litigated and determined. Most Cited Cases

Issue preclusion prevents relitigation of issues that have once been adjudicated even though claims for relief in the separate actions may have been different.

[11] Judgment 228 829(3)

228 Judgment
228XVII Foreign Judgments
228k829 Effect of Judgments of United States Courts in State Courts
228k829(3) k. Operation and effect. Most Cited Cases

Doctrine of issue preclusion or collateral estoppel bound former Chapter 7 debtor to bankruptcy court's factual determination that he transferred property with intent to defraud creditors and that he knowingly and fraudulently made false oath and that therefore his discharge had to be denied; thus, debtor could not prove that outcome in bankruptcy proceedings would have been different but for attorney's alleged negligence in preparing debtor's schedules and statement of affairs.

[12] Bankruptcy 51 3315(2)

51 Bankruptcy
51X Discharge
51X(B) Dischargeable Debtors
51X(B)2 Determination of Dischargeabil ity
51k3314 Evidence
51k3315 Presumptions and Burden of Proof
51k3315(2) k. Particular grounds for objection to discharge. Most Cited Cases

Bankruptcy 51 3317(1)

51 Bankruptcy
51X Discharge
51X(B) Dischargeable Debtors
51X(B)2 Determination of Dischargeabil ity
51k3314 Evidence
51k3317 Weight and Sufficiency
51k3317(1) k. In general. Most Cited Cases

When creditor objects to debtor's discharge, burden of proof is on creditor to prove by preponderance of evidence that debtor acted with fraudulent intent.

[13] Bankruptcy 51 3315(2)

51 Bankruptcy
51X Discharge
51X(B) Dischargeable Debtors
51X(B)2 Determination of Dischargeabil ity
51k3314 Evidence
51k3315 Presumptions and Burden of Proof
51k3315(2) k. Particular grounds for objection to discharge. Most Cited Cases

When creditor objects to debtor's discharge, bankruptcy court may deduce or infer requisite intent to hinder, delay, or defraud creditors from facts and circumstances of the case.

[14] Bankruptcy 51 3274

51 Bankruptcy
51X Discharge
51X(B) Dischargeable Debtors
51X(B)1 In General
51k3273 Grounds for Denial of Discharge
51k3274 k. Intent. Most Cited Cases

For purposes of denying discharge for intent to hinder, delay, or defraud creditors, finding of "reckless indifference to the truth" suffices to establish requisite intent to defraud.

[15] Bankruptcy 51 3274

51 Bankruptcy
51X Discharge
51X(B) Dischargeable Debtors
51X(B)1 In General
51k3273 Grounds for Denial of Discharge
51k3274 k. Intent. Most Cited Cases

Generally, debtor who acts in reliance on advice

of his attorney lacks intent required to deny his discharge, but his reliance must be in good faith.

[16] Attorney and Client 45 ⇐109

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k109 k. Acts and omissions of attorney in general. Most Cited Cases

Chapter 7 debtor's refusal to amend his statement of affairs and schedules prior to discharge hearing precluded finding in debtor's later legal malpractice action against his bankruptcy attorneys that bankruptcy attorneys' alleged negligence in failing to amend his schedules and statement proximately caused the denial of debtor's discharge for intending to defraud creditors and filing false statements.

***434** Third District, Salt Lake County; Tyrone Medley in the Barker case; Leslie A. Lewis in the Vlahos case. J. Bruce Reading, Wesley D. Hutchins, Salt Lake City, for Harline.

Thomas L. Kay, Mark O. Morris, Amy E. Weissman, Salt Lake City, for Barker and Whyte.

Carman E. Kipp, Michael F. Skolnick, Salt Lake City, for Vlahos.

***435** ZIMMERMAN, Chief Justice:

This opinion addresses two appeals filed by Wesley G. Harline from separate grants of summary judgment, each in favor of the attorneys who represented Harline in connection with his bankruptcy before the U.S. Bankruptcy Court for the District of Utah. After the bankruptcy court denied Harline's bankruptcy discharge, Harline brought two legal malpractice actions, the first against defendants Pete N. Vlahos and the law firm Vlahos and Sharp (collectively "Vlahos"), and the second against defendants Ronald C. Barker and Larry Whyte. Both sets of attorneys moved for summary judgment, alleging that they were not the proximate cause of the denial of Harline's discharge. The trial court in each action granted the motion, ruling that Harline had failed to produce any record evidence that the attorneys had caused the denial of Harline's bankruptcy discharge.[FN1] Harline appeals both rulings. Because each appeal raises similar claims, we consider them together and discuss pertinent differences between them in our analysis as necessary. We affirm both rulings.

FN1. The malpractice actions were assigned to different judges in the Third District Court.

" '[I]n reviewing a grant of summary judgment, we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.' " *K & T, Inc. v. Koroulis*, 888 P.2d 623, 624 (Utah 1994) (quoting *Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993)). Because summary judgment was entered against Harline in both cases, we state the facts in the light most favorable to him.

In February of 1986, Harline retained Vlahos in connection with his chapter 11 petition for bankruptcy. Harline gave Vlahos a list of his creditors and his assets. Vlahos filed Harline's bankruptcy petition on February 14, 1986. Five weeks later, on March 21st, Harline signed both a "Statement of Affairs for Debtor Not Engaged in Business" and schedules of his assets and liabilities. Harline's signature on each document was preceded by the statement "I, Wesley G. Harline, certify under penalty of perjury that I have read ... the foregoing ... and that [it is] true and correct to the best of my knowledge, information and belief." These documents were then submitted to the bankruptcy court.

In June of 1986, Vlahos withdrew as bankruptcy counsel for Harline, and Betty J. Marsh entered her appearance as counsel. Marsh subsequently withdrew, and in the fall of 1986, Barker and Whyte began representing Harline.[FN2] On September 18, 1986, the bankruptcy court converted Harline's case to a chapter 7 proceeding and entered an order directing Harline and his counsel to prepare and file chapter 7 schedules and statements on or before November 18, 1986.

FN2. The parties dispute the date on which Harline engaged Barker and Whyte. However, solely for purposes of this appeal, Barker and Whyte concede that they represented Harline during the relevant time period.

About two years later, in August of 1988, a hearing was held at which Harline's creditors objected to his bankruptcy discharge. By this date, Harline and his counsel still had not filed new or amended state-

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ments and schedules. At the conclusion of the hearing, the bankruptcy court orally denied Harline's discharge on the ground that there were omissions and inaccuracies in Harline's statement of affairs and bankruptcy schedules. The court based its denial of discharge on section 727(a)(2) and (4) of the Bankruptcy Code, which provides:

> The court shall grant the debtor a discharge, unless-
>
> ...;
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, ... or has permitted to be transferred ...
>
> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition;
>
> ...;
>
> ***436** (4) the debtor knowingly and fraudulently, in or in connection with the case-
>
> (A) made a false oath or account[.]

11 U.S.C. § 727(a).

The bankruptcy court found that Harline had failed to disclose transfers of partnership interests and real property on his March 21, 1986, statement of affairs. Specifically, Harline answered "No" when asked whether he had been engaged in a partnership or in any business during the six years immediately preceding the filing of his original bankruptcy petition. However, the court found that in January of 1985, thirteen months prior to the filing of his bankruptcy petition, Harline had assigned two partnership interests to the Weber Clinic pension plan,[FN3] which he should have disclosed on the statement. In addition, Harline answered "None" on the statement when asked whether he had made any transfer or other disposition of real or tangible personal property during the year immediately preceding the filing of his original bankruptcy petition. However, the court found that in January of 1985 and December of 1984, Harline executed, without consideration, four quitclaim deeds conveying real property to his children. Two of these deeds were recorded in November of 1985, three months prior to the filing of Harline's original bankruptcy petition; the other two were recorded in March and May of 1986, after Harline's petition was filed. The court held that the date the deed was recorded determined the date of each transfer and that Harline should have disclosed the real property transfers on his statement of affairs.

> FN3. Harline, a medical doctor, was employed by the Weber Clinic.

The court also found other omissions and misstatements in Harline's filing. Specifically, Harline owned a Merrill Lynch stock account at the time he filed his bankruptcy petition but failed to list the account on his bankruptcy schedules. In addition, immediately before and after filing his bankruptcy petition, Harline directed Merrill Lynch to cash out the account, and he used the $38,634.27 in proceeds for his personal expenses without authorization from the bankruptcy court. Finally, the court found that Harline did not reside at the address listed on his statement of affairs.

The bankruptcy court found that Harline made the transfers of property and cashed the Merrill Lynch account with the intent to hinder, delay, or defraud creditors and that he knowingly and fraudulently made a false oath by signing the statement of affairs and schedules which misstated his residence, denied the partnership and real property transfers, and omitted the Merrill Lynch account. In making these findings, the court noted that Harline had testified that he signed the statement of affairs and schedules "after only glancing through them [and t]hat he didn't read them, that he was not familiar with bankruptcy law or bankruptcy rules, but that he gave information [omitted from his statement and schedules] to his attorney." However, the court concluded:

> My findings as to intent to hinder, delay or defraud creditors and knowing and fraudulent false oath are made because of the significant number of wrongful acts and the reckless indifference to the truth showed [sic] by Wesley G. Harline.

The sheer weight of the evidence gives rise to the

inescapable conclusion that Wesley G. Harline acted knowingly and with the intent to avoid paying creditors with the intent to conceal property or to place the property beyond the reach of creditors.

The Court therefore will not grant to the debtor a discharge. Discharge will be denied.

After the bankruptcy discharge ruling, Harline's attorneys moved to alter or amend the judgment. The motion addressed all the bases the judge gave for his ruling: Harline contended that the real property transfers to his children occurred on the dates Harline conveyed the deeds and not on the dates the deeds were recorded; that liquidating the Merrill Lynch stock account constituted an exchange of assets rather than a transfer; and that Harline did not knowingly and fraudulently make a false oath because he provided his attorneys with all of the information for his statement of affairs and schedules, ***437** advised them of subsequent changes, did not himself prepare or file the statement and schedules, was unfamiliar with bankruptcy rules, relied on the advice of counsel, was unaware that the statement and schedules contained erroneous information, and signed the schedules after only briefly glancing through them. The bankruptcy court denied the motion to alter or amend the judgment. Harline's attorneys then appealed, and in May of 1989, the federal district court dismissed Harline's appeal, affirming both the denial of discharge and the denial of the motion to alter or amend.

Harline next filed a malpractice lawsuit in state court in January of 1990, alleging that Vlahos' negligent preparation of Harline's statement of affairs and schedules directly resulted in the denial of Harline's bankruptcy discharge.[FN4] In December of 1990, Vlahos filed the first of three motions for summary judgment, contending that Harline's suit was barred by equitable and collateral estoppel and that even if Vlahos was negligent, that negligence was not the proximate cause of Harline's denial of discharge.[FN5] The district court denied the motion in June of 1991.

FN4. Harline also alleged that Vlahos' negligence directly resulted in the loss of any exemptions. All parties to this appeal conceded at oral argument that the exemption issue is moot, because the bankruptcy court eventually allowed Harline to file an amended exemption schedule which was considered on its merits in the federal courts. *See* *Harline v. Barker*, 854 P.2d 595, 598 n. 1 (Utah Ct.App.), *cert. denied*, 862 P.2d 1356 (Utah 1993).

FN5. Vlahos contended that (i) Harline's signature on the statement of affairs and schedules constituted an intervening cause; (ii) Harline's failure to amend his statement and schedules was the proximate cause of his denial of discharge; and (iii) Harline's pre-petition fraudulent conveyances and misstatements in the original statement and schedules caused his denial of discharge.

Meanwhile, in November of 1990, Harline filed a second malpractice lawsuit in state district court against Barker and Whyte, alleging that their failure to prepare an amended or new statement of affairs and schedules resulted in the denial of Harline's discharge.[FN6] Barker and Whyte filed their first motion for summary judgment, alleging that Harline's claims were barred by equitable estoppel, that they had no duty to amend the schedules, and that they were not the proximate cause of the denial of Harline's discharge. The trial court granted Barker and Whyte's motion. Vlahos then immediately moved for summary judgment a second time in his separate suit on the ground that the Barker and Whyte judgment constituted res judicata as to the proximate cause issue. The trial court granted Vlahos' second motion.[FN7]

FN6. Harline also alleged that Barker and Whyte's negligence resulted in the denial of any exemptions. This allegation is now moot. *See supra* note 4.

FN7. The propriety of the trial court's decision on Vlahos' second motion for summary judgment is not before us in this appeal, and we therefore express no opinion regarding the basis for that court's ruling.

Harline appealed both rulings to this court, which transferred the cases to the Utah Court of Appeals. The appeals court reversed the Barker and Whyte judgment, holding that the trial court erred in granting summary judgment on the proximate cause issue. *Harline v. Barker*, 854 P.2d 595 (Utah Ct.App.), *cert. denied*, 862 P.2d 1356 (Utah 1993). The appeals court held that a genuine issue of material fact existed as to

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how a "reasonable juror" would have ruled regarding Harline's intent to defraud if Harline had submitted amended bankruptcy schedules. *Id.* at 602. The appeals court subsequently issued an unpublished memorandum decision reversing and remanding the Vlahos judgment on the basis of its decision in *Barker*. *Harline v. Vlahos*, No. 930067, slip op. (Utah Ct.App. Aug. 5, 1993) (mem.).

Vlahos then filed a motion requesting that the original bankruptcy judge clarify his August 1988 order denying Harline's discharge. Vlahos asked the judge to rule that he would have denied Harline's discharge even if Harline had amended his schedules. In essence, Vlahos wanted the bankruptcy judge to state for the record that it was Harline's own wrongdoing that caused the denial of his discharge. On January 24, 1994, the bankruptcy court held a hearing on Vlahos' motion.***438** Although noting that he was being asked to clarify an order entered over five years earlier and his discomfort with the fact that Harline's attorney was not present, the bankruptcy judge entered an oral ruling "that an amendment would have made no difference whatsoever with this Court's denial of discharge, that the act was the act of Mr. Harline, Wesley Harline, and not the act of any lawyers" and directed "everybody concerned" to his opinion in *Job v. Calder (In re Calder)*, 93 B.R. 734, 737-38 (Bankr.D.Utah 1988) (finding debtor's subsequent disclosure of property interests omitted from statement and schedules insufficient to rebut debtor's intent to defraud), *aff'd*, 907 F.2d 953 (10th Cir.1990). Vlahos' counsel submitted a written order to the bankruptcy court incorporating its oral ruling. Harline's counsel then moved for reconsideration. At an April 25, 1994 hearing on the reconsideration motion, the bankruptcy judge refused to sign the prepared order. However, the judge reiterated that he originally denied Harline's discharge as a matter of law on the basis of *Calder*.

Barker and Whyte then filed their second motion for summary judgment in state district court. They contended that no issues of material fact remained as to causation because the bankruptcy court's January 24th oral ruling conclusively resolved any question as to how the original bankruptcy judge, or any bankruptcy judge, would have ruled on Harline's discharge even if Harline had submitted an amended statement of affairs and schedules. In response, Harline moved to strike any reference to the January 24th ruling, vigorously contesting both the ethical propriety and the admissibility of the ruling. In addition, in an attempt to establish the existence of a disputed issue of material fact, Harline submitted portions of Whyte's deposition and answers to interrogatories which indicated that Whyte knew Harline's statement of affairs and schedules were deficient. After a hearing, the trial court granted the summary judgment motion.

Meanwhile, Vlahos filed his third motion for summary judgment. This motion essentially mirrored Barker and Whyte's second summary judgment motion. In addition, Vlahos argued that the doctrine of res judicata precluded Harline from litigating the proximate cause issue because of the trial court's decision in the Barker and Whyte case. The trial court granted summary judgment in favor of Vlahos, ruling that there was no longer any material fact at issue, that Harline could not establish that any act or omission by Vlahos proximately caused his loss, and as an additional ground, that the Barker and Whyte judgment was res judicata as to the proximate cause issue.

Harline appeals both rulings. In each appeal, Harline claims that (i) the trial court improperly admitted the January 24, 1994 bankruptcy ruling; (ii) the very issuance of the bankruptcy judge's January 24th ruling violated rule 52(b) of the Federal Rules of Civil Procedure and section 105 of the Bankruptcy Code, was an unconstitutional advisory opinion and, on the merits, was clearly erroneous; and (iii) disputed issues of fact regarding proximate cause preclude summary judgment. We decline to address Harline's second set of claims because he has presented no authority for the proposition that this court could constitutionally review an order emanating from a federal bankruptcy court. In any event, in light of our holding today, we need not reach these claims.

We first state the applicable standard of review. "Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law." *K & T, Inc.*, 888 P.2d at 626-27 (citing Utah R.Civ.P. 56(c); *Higgins*, 855 P.2d at 235). "Because entitlement to summary judgment is a question of law, we accord no deference to the trial court's resolution of the legal issues presented." *Id.* at 627 (citing *Higgins*, 855 P.2d at 235; *Ferree v. State*, 784 P.2d 149, 151 (Utah 1989)). " 'We determine only whether the trial court erred in applying the governing law and whether the

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trial court correctly held that there were no disputed issues of material fact.' " *Id.* (quoting *Ferree* 784 P.2d at 151). In addition, "we may affirm a grant of summary judgment on any ground available to the trial court, even if it is not one relied on below." *Higgins*, 855 P.2d at 235.

***439** As a preliminary matter, we address the question of whether a judge or a jury should decide two issues relating to proximate cause in legal malpractice actions. These issues are common to both appeals before us. Harline first contends that proximate cause issues inevitably raise jury questions and always preclude summary judgment. Harline further contends that if he should prevail on these appeals, at trial a jury should decide whether a reasonable judge would have granted him a discharge absent the alleged negligence of his attorneys, despite the fact that only a bankruptcy judge could have made this determination in the first instance. We disagree with both contentions.

[1] We first address the contention that the presence of a question of proximate cause precludes a summary judgment. In a legal malpractice action, a plaintiff must plead and prove (i) an attorney-client relationship; (ii) a duty of the attorney to the client arising from their relationship; (iii) a breach of that duty; (iv) a causal connection between the breach of duty and the resulting injury to the client; and (v) actual damages. *Williams v. Barber*, 765 P.2d 887, 889 (Utah 1988); 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 27.5, at 635 (3d ed. 1989). For the purposes of their summary judgment motions, both Vlahos and Barker and Whyte conceded the existence of an attorney-client relationship, a duty owed to Harline, and breach of that duty. Thus, the question before each trial court was whether the attorneys' breach of duty proximately caused Harline's denial of discharge.

[2][3] Proximate cause is " 'that cause which, in natural and continuous sequence[ ] (unbroken by an efficient intervening cause), produces the injury and without which the result would not have occurred. It is the efficient cause-the one that necessarily sets in operation the factors that accomplish the injury.' " *Mitchell v. Pearson Enters.*, 697 P.2d 240, 245-46 (Utah 1985) (quoting *State v. Lawson*, 688 P.2d 479, 482 & n. 3 (Utah 1984)). Generally, the question of proximate cause raises an issue of fact "to be submitted to the jury for its determination." *Mitchell*, 697 P.2d at 245; *see also* 2 Mallen & Smith, *supra*, § 27.10, at 657. However, there are occasions when no jury question is presented. As Prosser and Keeton explain, "Two kinds of questions, then, are always to be decided by the jury if reasonable persons could differ about them on the evidence received at trial-first, fact questions in the usual sense and, second, evaluative applications of legal standards (such as the legal concept of 'foreseeability') to the facts." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 45, at 320 (5th ed. 1984). Accordingly, if "there could be no reasonable difference of opinion" on a determination of the facts "in the usual sense" or on an evaluative application of the legal standard to the facts, then the decision is one of law for the trial judge or for an appellate court. *Id.* at 319-20; *cf. State v. Pena*, 869 P.2d 932, 936-39 (Utah 1994) (discussing nature of legal questions). At the other extreme, when the facts are so tenuous, vague, or insufficiently established that determining causation becomes "completely speculative," the claim fails as a matter of law. *Mitchell*, 697 P.2d at 246; *see also Steffensen v. Smith's Management Corp.*, 820 P.2d 482, 486-87 (Utah Ct.App.1991), *aff'd*, 862 P.2d 1342 (Utah 1993).

[4] Contrary to Harline's first contention, then, proximate cause issues can be decided as a matter of law when a determination of the facts falls on either of two opposite ends of a factual continuum. Thus, summary judgment is appropriate (i) when the facts are so clear that reasonable persons could not disagree about the underlying facts or about the application of a legal standard to the facts, and (ii) when the proximate cause of an injury is left to speculation so that the claim fails as a matter of law. We therefore reject Harline's first contention that the presence of an issue of proximate cause precludes summary judgment.

[5] We now turn to Harline's second contention, that only a jury sitting in the malpractice action should decide what a reasonable judge should have done in the underlying suit. To prove proximate cause in legal malpractice cases such as Harline's, the plaintiff must show that absent the attorney's negligence, the underlying suit would have been successful. Thus, the proximate***440** cause issue is ordinarily handled by means of a " 'suit within a suit' or 'trial-within-a-trial.' " 2 Mallen & Smith, *supra*, § 27.7, at 641. "The objective is to establish what the result

[of the underlying litigation] *should have* been (an objective standard), not what a particular judge or jury *would have* decided (a subjective standard)." *Id.* § 27.7, at 641-42.

[6] Seemingly because of this objective standard, a number of courts have concluded that "[i]f the underlying suit would have been tried to a jury, or a judge sitting as a trier of fact, ... the jury in the malpractice case should decide the disputed factual issues pertaining to the original suit." *Phillips v. Clancy*, 152 Ariz. 415, 733 P.2d 300, 306 (Ct.App.1986). In other words, the identity of the original trier of fact makes no difference; rather, "the line dividing the responsibility of judge and jury runs between questions of law and questions of fact." *Chocktoot v. Smith*, 280 Or. 567, 571 P.2d 1255, 1259 (1977) (en banc); *see also Helmbrecht v. St. Paul Ins. Co.*, 122 Wis.2d 94, 362 N.W.2d 118, 134 (1985). Following this line of reasoning, these courts have concluded that it is appropriate for a malpractice jury to decide how a reasonable administrative law judge should have ruled on an applicant's eligibility for Social Security disability benefits had the applicant's attorney filed a timely appeal, *Phillips*, 733 P.2d at 307; how a reasonable judge in a divorce action should have divided marital assets had the plaintiff's attorney properly established the value of the assets, *Helmbrecht*, 362 N.W.2d at 135-37; and how a reasonable probate judge should have ruled on whether a claimant was a decedent's heir had the claimant's attorney properly discovered and presented evidence and filed a timely appeal of the original adverse decision, *Chocktoot*, 571 P.2d at 1259.

While the fact versus law distinction followed by these courts has some superficial analytic appeal, we reject its application in this context. Harline seeks to have a jury determine what only a bankruptcy judge could have determined in the first instance. We see no reason why a malpractice plaintiff should be able to bootstrap his way into having a lay jury decide the merits of the underlying "suit within a suit" when, by statute or other rule of law, only an expert judge could have made the underlying decision. It is illogical, in effect, to make a change in the law's allocation of responsibility between judge and jury in the underlying action when that action is revisited in legal malpractice actions and thereby distort the "suit within a suit" analytic model. *See* 2 Mallen & Smith, *supra*, § 27.23, at 693 n. 5. To so proceed ignores and, in some cases, contradicts the public policy goals which prompted the initial assignment of decision-making authority respectively to judges and to juries on specific issues. There is no basis for abrogating those public policy goals simply because the matter arises in a legal malpractice context.

Nor do we agree with the implication, not well-analyzed by those courts applying the simplistic fact versus law distinction, that a judge sitting in a malpractice case would be any less objective than a jury in determining what a reasonable judge should have done in the underlying case.[FN8] We simply do not see the logical connection between ensuring an objective determination of how the underlying case should have come out and the identity of the arbiter who makes that objective determination. Rather, it makes far more practical sense to apply the rule that if the underlying case could only have been tried by a judge, then this aspect of the malpractice claim-the suit within the suit-must likewise be tried by a judge.

> FN8. We note that "what a reasonable judge should have done" is not a different inquiry than "what the plaintiff should have recovered." These are identical inquiries; we do not mean to suggest that "there may be characteristics peculiar to a judge in the decision-making process." 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 27.23, at 693 n. 9 (3d ed. 1989). Rather, we use the "reasonable judge" term to indicate that a statute or other rule of law permits only a judge to make the underlying decision.

The next question we address, also common to both appeals, is whether both trial courts erred in considering the bankruptcy court's January 24th ruling regarding the motion to clarify its original order denying Harline's bankruptcy discharge. "[I]nadmissible***441** evidence cannot be considered in ruling on a motion for summary judgment." *D & L Supply v. Saurini*, 775 P.2d 420, 421 (Utah 1989). Therefore, we must determine whether the two trial courts properly admitted the bankruptcy court's January 24th oral ruling.

The trial court in the Vlahos case held a pretrial hearing in May of 1994 on Harline's motion in limine to exclude the bankruptcy court ruling.[FN9] The transcript indicates that the trial court likened the bank-

ruptcy judge's ruling to expert testimony. The trial court appears to have weighed the prejudicial effect of the ruling against its probativeness, as required by rule 403 of the Utah Rules of Evidence, noting that the oral ruling was not "unduly prejudicial" and "no more prejudicial than probative." [FN10] Thus, the trial court concluded that the bankruptcy court ruling on the motion to clarify was relevant and admissible evidence in an objective determination of how a reasonable judge might have ruled on Harline's discharge absent any alleged negligence on the part of Vlahos.

> FN9. The record does not indicate how the trial judge in the Barker and Whyte case ruled on Harline's motion to strike the January 24th bankruptcy ruling. However, because Barker and Whyte's summary judgment motion relied solely on the January 24th ruling, we must assume that the trial court in that case implicitly ruled that the January 24th ruling was admissible.
>
> FN10. Rule 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Utah R.Evid. 403.

"In reviewing a trial court's ruling on the admissibility of evidence under rule 403, we will not overturn the court's determination unless it was an 'abuse of discretion.' " *State v. Hamilton*, 827 P.2d 232, 239 (Utah 1992). Thus, we must decide "whether, as a matter of law, the trial court's decision that 'the unfairly prejudicial potential of the evidence outweighs [or does not outweigh] its probativeness' was beyond the limits of reasonability." *Id.* at 239-40 (alteration in original) (quoting *State v. Ramirez*, 817 P.2d 774, 781-82 n. 3 (Utah 1991)). We conclude that both trial courts erred in considering the bankruptcy court ruling in connection with the motions for summary judgment but that the error in each case was harmless.

[7] Because an objective standard applies in legal malpractice cases, virtually all authorities agree that subjective opinion testimony from the judge who presided over the original case as to how that judge would have ruled absent the alleged negligence of the attorney is improper and inadmissible. *Phillips*, 733 P.2d at 303-06; *Chocktoot*, 571 P.2d at 1258-59; *Helmbrecht*, 362 N.W.2d at 125-26; *see also* 2 Mallen & Smith, *supra*, § 27.17, at 683. Such testimony is considered inadmissible because its marginal relevance to an objective inquiry as to what the outcome of the underlying litigation should have been is substantially outweighed by the possible prejudice created when a judge, "in effect, sides with one of the litigants in an ongoing proceeding." *Phillips*, 733 P.2d at 305. Such testimony also raises ethical and public policy concerns because it creates an appearance of partiality on behalf of one of the current litigants by the judge who testifies. *Id.* In addition, permitting such testimony may produce disruption in the courts. For example, if the judge who tried the underlying case is permitted to testify in the subsequent malpractice action, the same would seem to apply to jurors when the underlying case is tried to a jury. "The specter of such a scene throws a chill down our judicial spine." *Id.* at 306; *see also* 2 Mallen & Smith, *supra*, § 27.17, at 683. We lay it to rest today.

While we express no view on the bankruptcy court's actions, we note that the oral ruling was intended to clarify an order entered five and one-half years earlier, that it was rendered without the presence of Harline's counsel, apparently withdrawn on the subsequent objection of Harline's counsel and, in its final form, contained little of the hypothetical speculation to which Harline objects. We fail to see how the January 24th ruling had much, if any, probative value. We thus conclude that what little probative value it may have had was substantially outweighed by prejudice. Therefore, each trial ***442** court abused its discretion in considering the oral ruling.

[8][9] However, we conclude that any error in the trial courts' admission of this evidence was harmless. " 'Harmless' errors are 'errors which, although properly preserved below and presented on appeal, are sufficiently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings.' " *Hamilton*, 827 P.2d at 240 (quoting *State v. Verde*, 770 P.2d 116, 120 (Utah 1989)); *see also* Utah R.Civ.P. 61; Utah R.Evid. 103(a); Utah R.Crim.P. 30(a). Put another way, " '[f]or an error to require reversal, the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict.' " *Id.* (quoting *State v. Knight*, 734 P.2d 913 (Utah 1987)). The error here

does not undermine our confidence in the summary judgment granted to Vlahos or to Barker and Whyte. We reach this conclusion because we agree with each trial court that Harline failed to raise any disputed issue of material fact indicating that Vlahos or Barker and Whyte caused his denial of discharge. We examine each case separately.

[10][11] Turning first to Harline's malpractice claim against Vlahos, we are satisfied that the doctrine of issue preclusion, or collateral estoppel, binds Harline to the bankruptcy court's factual determination that he transferred property with the intent to hinder, delay, or defraud creditors and that he knowingly and fraudulently made a false oath, even if Vlahos negligently prepared Harline's statement and bankruptcy schedules. Issue preclusion prevents the relitigation of issues that have once been adjudicated even though the claims for relief in the separate actions may be different. *Penrod v. Nu Creation Creme, Inc.*, 669 P.2d 873, 875 (Utah 1983). The doctrine applies only if four requirements are met:

> First, the issue in both cases must be identical. Second, the judgment must be final with respect to that issue. Third, the issue must have been fully, fairly, and competently litigated in the first action. Fourth, the party who is precluded from litigating the issue must be either a party to the first action or a privy of a party.

Madsen v. Borthick, 769 P.2d 245, 250 (Utah 1988); *see also Noble v. Noble*, 761 P.2d 1369, 1374 (Utah 1988); *Wilde v. Mid-Century Ins. Co.*, 635 P.2d 417, 419 (Utah 1981); *Searle Bros. v. Searle*, 588 P.2d 689, 691 (Utah 1978).

Under the first requirement of issue preclusion, we must examine whether the precise issue decided by the bankruptcy court is identical to the issue presented in Harline's malpractice action against Vlahos. The bankruptcy court had to determine whether, in light of Vlahos' alleged negligence in omitting assets from Harline's bankruptcy schedules, Harline (i) intended to hinder, delay, or defraud a creditor or the bankruptcy trustee by making the four property transfers and by cashing in the Merrill Lynch account, and (ii) knowingly or fraudulently made a false oath. A brief review of the nature of bankruptcy discharge hearings and the evidence presented at Harline's hearing helps to put the precise issue before the bankruptcy court in focus.

[12][13][14][15] When a creditor objects to a debtor's discharge in bankruptcy, the burden of proof is on the objecting creditor to prove by a preponderance of the evidence that the debtor acted with fraudulent intent. *In re Caldwell*, 101 B.R. 728, 732-33 (Bankr.D.Utah 1989) (mem.). However, the bankruptcy judge may deduce or infer the requisite intent from the facts and circumstances of the case. *Calder*, 907 F.2d 953, 956 (10th Cir.1990). A finding of "reckless indifference to the truth" also suffices to establish the requisite intent to defraud. *Calder*, 93 B.R. at 736 (citing *In re Tully*, 818 F.2d 106 (1st Cir.1987)). The debtor, of course, is then entitled to explain his actions so as to avoid a finding that he acted with fraudulent intent. "Generally, a debtor who acts in reliance on the advice of his attorney lacks the intent required to deny him a discharge of his debts. However, the debtor's reliance must be in good faith." *First Beverly Bank v. Adeeb (In re Adeeb)*, 787 F.2d 1339, 1343 (9th Cir.1986) (citations omitted) (noting availability of defense to § 727(a)(2) fraudulent transfers); *see also* *443 *Poolquip-McNeme, Inc. v. Hubbard (In re Hubbard)*, 96 B.R. 739, 742 (Bankr.W.D.Tex.1989) ("Bankruptcy courts have not imposed strict liability under § 727(a)(4) for omissions from schedules."); *Calder*, 93 B.R. at 737 (noting that liability for false oath should not be imposed for mistaken or inadvertent omissions). Accordingly, Harline's good faith reliance on Vlahos' advice and preparation of the statement and schedules was a plausible defense in the bankruptcy discharge hearing.

Harline did in fact raise the defense of good faith reliance at the discharge hearing. He testified that he told Vlahos about his assets, including the transfers of property to his children, and that Vlahos failed to list this information in Harline's bankruptcy statement and schedules.[FN11] In his subsequent motion to alter or amend the judgment denying his bankruptcy discharge, Harline asserted these same facts as well as additional legal arguments which attempted to justify the property transfers and the cashing of the Merrill Lynch account. It thus appears that Harline's sole aim in the Vlahos malpractice lawsuit is to have a jury reconsider the very issue that was decided by the bankruptcy court in 1988: namely, whether Harline acted with fraudulent intent or innocently relied on incompetent attorneys.

> FN11. Harline testified as follows: He "wasn't familiar at all" with bankruptcy rules and Sam Herscovitz of the Vlahos firm instructed him with regard to bankruptcy; he tried to give Herscovitz "the information as to my practice and my ownership of property" which Harline considered to be accurate, but Herscovitz "didn't go through everything"; Harline told Herscovitz (who had died by the time of trial) about the property transfers to his children; Herscovitz or someone from the Vlahos firm prepared the statement and schedules; Vlahos' signature was on the schedules, but Harline did not know that Vlahos was his attorney; Harline had the opportunity to look through the resulting document "but didn't look through it" and only "glanced through it" because he was "working so long and so hard in his practice"; he intended to give complete and full disclosure to his creditors; and he had no reason to believe at the time he signed the document that it contained inaccurate information. Harline also explained that he was residing at the address listed on his statement and schedules when he first met with Herscovitz.

In this regard, we note that even if all the facts surrounding Vlahos' failure to list assets were not brought out in the bankruptcy proceedings, the issue before the bankruptcy court and the issue in Harline's malpractice case against Vlahos are nonetheless the same. "The *minimum* reach of issue preclusion beyond precise repetition of the first action is to prevent relitigation by mere introduction of cumulative evidence bearing on a simple historical fact that has once been decided." 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4417, at 157 (1981) (emphasis added). Further, "[b]road definition of the issue precluded is most appropriate as to efforts to advance new arguments as to facts that had been fixed by the time of the first litigation." *Id.* at 158. We are thus satisfied that the first requirement of issue preclusion is met because the issue Harline seeks to litigate in the Vlahos malpractice suit is identical to the issue Harline previously litigated in the bankruptcy trial.

We are equally satisfied that the remaining requirements of issue preclusion-that the judgment was final, that the issue was fully, fairly, and competently litigated in the first action, and that Harline was a party to the first action-are met here. It is undisputed that the bankruptcy court judgment is final, because it was affirmed by the United States District Court, and Harline took no further appeal. We are also convinced, pursuant to our discussion above, that the issue was fully, fairly, and competently litigated [FN12] and that a determination of Harline's intent in light of Vlahos' negligence was essential to the bankruptcy court's judgment. Finally, under the last requirement of issue preclusion, there is no question that Harline was a party to the bankruptcy proceeding. Thus, because all four requirements of issue preclusion are met here, Harline is bound by the bankruptcy court's factual finding that he acted with the requisite state of mind to support a denial of discharge despite Vlahos' negligent preparation of the statement of affairs and schedules.

> FN12. We note that in his malpractice complaint against Barker and Whyte, Harline did not allege negligent representation at the bankruptcy discharge hearing or in the handling of his appeal of the judgment denying him discharge.

***444** Thus, Harline has failed to raise a genuine issue of material fact that Vlahos proximately caused the denial of Harline's bankruptcy discharge. Harline's sole claim in these proceedings is that Vlahos' initial failure to list assets that Harline disclosed to the firm caused Harline's denial of discharge. However, "[d]emonstrating material issues of fact with respect to defendants' negligence is not sufficient to preclude summary judgment if there is no evidence that establishes a direct causal connection between that alleged negligence and the injury." *Mitchell*, 697 P.2d at 245. Under the doctrine of issue preclusion, the bankruptcy court's finding that Harline acted with fraudulent intent despite his reliance on Vlahos is binding. That finding defeats the causation element of Harline's negligence claim against Vlahos, thereby defeating the malpractice claim. *See Lane v. Sullivan*, 900 F.2d 1247, 1250-51 & n. 5 (8th Cir.) (holding that earlier judgment that plaintiffs understood a stock transfer precluded malpractice claim against attorney for misrepresenting or failing to represent true nature of transfer), *cert. denied*, 498 U.S. 847, 111 S.Ct. 134, 112 L.Ed.2d 101 (1990); *Falconer v. Meehan*, 804 F.2d 72, 75-76 (7th Cir.1986) (bankruptcy court finding that attorney advised client of contents of dissolution agreement precluded relitigation of issue

in malpractice action); *see also Standage v. Jaburg & Wilk, P.C.*, 177 Ariz. 221, 866 P.2d 889, 895-96 (Ct.App.1993) (holding that bankruptcy court ruling that debtor's first attorney did not commit malpractice by failing to inform debtor of deadline precluded same claim in state court against different attorneys). Because Harline is precluded from relitigating Vlahos' failure to list Harline's assets, Harline has not presented a genuine issue of material fact that would enable him to prove in a malpractice trial that he would have won the underlying "suit within a suit." *See Lane*, 900 F.2d at 1250 n. 5; *Standage*, 866 P.2d at 896. Even though the trial court came to this conclusion from a different route, we affirm its grant of summary judgment in favor of Vlahos.

[16] Turning to Harline's malpractice claim against Barker and Whyte, we conclude that the evidence which Harline submitted in response to Barker and Whyte's motion for summary judgment not only fails to raise an issue of material fact, but leaves no room for reasonable minds to conclude that Barker and Whyte could have proximately caused the denial of Harline's bankruptcy discharge.

Harline's sole claim against Barker and Whyte is that they negligently failed to amend his statement of affairs and schedules. Barker and Whyte's defense in their motion for summary judgment was that no amendment could have cured Harline's original fraudulent transfers and false statement and schedules. Barker and Whyte submitted the bankruptcy court's January 24th ruling as the only evidence supporting their defense. First, we reject any implicit argument that the bankruptcy court's original findings regarding Harline's fraudulent intent are binding on Harline in his suit against Barker and Whyte under the doctrine of issue preclusion. There is no evidence that Barker and Whyte's failure to amend Harline's statement and schedules was raised in Harline's discharge hearing before the bankruptcy court. Further, Whyte represented Harline at the discharge hearing. Under these circumstances, issue preclusion does not apply. *See generally Bucci v. Rustin*, 227 Ill.App.3d 779, 169 Ill.Dec. 810, 592 N.E.2d 297 (1992).

Second, we reject Barker and Whyte's express argument, based on the bankruptcy court's January 24th ruling, that amendments could not have cured Harline's false statement of affairs and schedules. We, like the court of appeals, cannot say as a matter of law that timely amendments would not have prevented the denial of Harline's discharge. *See Harline v. Barker*, 854 P.2d at 602. However, we disapprove of the court of appeals' assertion that "[c]ertainly an amendment would have removed the section 727(a)(4)(A) ground for denial of discharge as the schedules would no longer be false." *Id.* This assertion is simply untrue. Amendments do not negate the original false statement or schedules. Rather, they help negate a finding that the debtor filed the false documents with the intent to defraud. *See New World Mktg. Corp. v. Garcia (In re Garcia)*, 88 B.R. 695, 705 n. 19 (Bankr.E.D.Pa.1988) ***445** ("The existence of sanctions for failure to disclose assets would serve no purpose if deficiencies could simply be remedied any time parties in interest call attention to them."). In short, the fact that a debtor files amendments is only one of many factors a bankruptcy court considers in determining whether the debtor initially acted with fraudulent intent.

Consequently, under this same analysis, even if the bankruptcy court's January 24th ruling was admissible, it could not have established as a matter of law that amendments would have had no effect on Harline's bankruptcy discharge. As discussed earlier in this opinion, bankruptcy courts do not impose strict liability on debtors who file false statements and schedules; rather, they make a determination based on the facts and circumstances of the case. The failure to file timely amendments is simply one fact which indicates fraudulent intent. *Caldwell*, 101 B.R. at 739. Accordingly, even if the bankruptcy court's January 24th ruling was admissible, that evidence could not have eliminated the factual question of whether a reasonable bankruptcy judge would have denied Harline's discharge had he submitted timely amendments.

Because we cannot decide as a matter of law that timely amendments would have had no effect on the outcome of Harline's discharge trial and because we hold today that the bankruptcy court's January 24th ruling is inadmissible, we ordinarily would remand on the grounds that Barker and Whyte, as the moving parties, have failed to meet their burden of demonstrating that there are no disputed issues of material fact regarding proximate cause. [FN13] *Walker Drug Co. v. La Sal Oil Co.*, 902 P.2d 1229, 1233 (Utah 1995); *K & T, Inc.*, 888 P.2d at 628. Unless the moving party meets its initial burden to present evidence establishing that no genuine issue of material fact exists, "the

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party opposing the motion is under no obligation to demonstrate that there is a genuine issue for trial." *K & T, Inc.*, 888 P.2d at 628; *see also* Utah R.Civ.P. 56(e); *cf. Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120, 124 (Utah 1994). On the other hand, we cannot turn a blind eye to the nonmoving party's evidence when that party chooses to respond to the summary judgment motion. In this case, Harline's own evidence compels us to affirm the trial court's grant of summary judgment. In light of that evidence, we conclude that no reasona ble person could find that Barker and Whyte proximately caused Harline's injury.

> FN13. Barker and Whyte argue that even if the bankruptcy court's January 24th ruling was improperly admitted, under the reasoning of *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the burden is on Harline to produce some evidence showing that Barker and Whyte proximately caused the denial of Harline's discharge. *See id.* at 323-24, 106 S.Ct. at 2552-53. This court has not previously adopted the reasoning of the majority opinion in *Celotex*, which is not binding on us as a matter of law, and declines to do so today.

Both in response to Barker and Whyte's motion for summary judgment and on appeal to this court, Harline relied on Whyte's answer to an interrogatory to undercut Barker and Whyte's assertion that amendments would have made no difference to the outcome of Harline's discharge hearing. Whyte's answer contained the following:

> [I]n the summer of 1988, defendant Whyte determined that Dr. Harline's statement of affairs and schedules were inadequate as to their content, which determination defendant Whyte related to [Harline]. Further, the risk involved in going ahead with the [discharge] trial without amending the schedules was specifically related to [Harline].... [S]ubsequ ent to May, 1988, ... *Dr. Harline specifically instructed Mr. Whyte not to file amended statements or schedules.*

(Emphasis added.) Both at the trial court and on appeal, Harline has not denied instructing Whyte not to amend the schedules, nor have we found any record evidence supporting a denial even if one had been made.[FN14] ***446** As a result, we must conclude that it is undisputed that Harline directed Whyte not to amend the statement of affairs and schedules. This conclusion should come as no surprise to Harline, because Barker and Whyte in their brief specifically discussed Harline's instruction to Whyte not to amend the statement of affairs and schedules, and Harline in his reply brief did not mention the evidence, let alone dispute it.

> FN14. We note that Harline filed a supplemental affidavit in response to Barker and Whyte's first motion for summary judgment in which he said, "Whyte ... repeatedly advised [Harline] that amended schedules and statement of affairs had to be prepared and filed, but Mr. Whyte never undertook to prepare or file such schedules or statement of affairs." When asked in a deposition whether he instructed Barker and Whyte to fix his statement and schedules, Harline replied, "I don't recall whether I did or not." In Harline's response to Barker and Whyte's supplement to their first motion for summary judgment, Harline denied that Whyte advised him of the need to file amended schedules, but he filed no affidavit and pointed to no evidence to support the denial.

This evidence demonstrates that Harline chose not to pursue his available legal remedy of amendin g his statement of affairs and schedules prior to his bankruptcy discharge hearing in August of 1988. " 'We do not believe it would be wise judicial policy to allow one party to create legal liability in another by a voluntary exercise of the complaining party's own personal business judgment not to seek to protect his rights in the legal forums provided him.' " *Horn v. Moberg*, 68 Wash.App. 551, 844 P.2d 452, 456 (1993) (holding client's independent, voluntary decision to dismiss products liability suit precluded finding that attorney's alleged negligent preparation of case proximately caused client's injury) (quoting *King v. Seattle*, 84 Wash.2d 239, 525 P.2d 228, 236 (1974)). Admittedly, late-filed amendments may not have been as effective as earlier-filed amendments in demonstrating Harline's lack of intent to defraud, but we cannot say that they would have been useless. In short, Harline's refusal to amend his statement and schedu les precludes a finding that Barker and Whyte proximately caused the denial of Harline's bankruptcy discharge. Accordingly, the trial court correctly granted Barker and Whyte's motion for summary

judgment.

In sum, we affirm summary judgment in the Vlahos action because Harline is precluded from relitigating Vlahos' failure to list assets in Harline's original statement of affairs and schedules. Without the ability to relitigate this issue, Harline cannot prove that Vlahos' negligence proximately caused the denial of Harline's bankruptcy discharge. We also affirm summary judgment in the Barker and Whyte action because Harline's evidence that he instructed his attorneys not to amend his statement and schedules precludes a finding that Barker and Whyte's negligence proximately caused the denial of Harline's discharge.

STEWART, Associate C.J., and HOWE, DURHAM and RUSSON, JJ., concur in Chief Justice ZIMMERMAN's opinion.

Utah,1996.
Harline v. Barker
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END OF DOCUMENT

Subj: **trust**
Date: 1/4/2005 2:37:57 P.M. Mountain Standard Time
From: MBreton909
To: Neilbreton
CC: Berton@netvision.net.IL

Hi Neil,
Here is a summary of my conversation with Rhonda Jan 3, 05.
Willie: Rhonda, I am going home tomorrow and wanted to know what's happening with the letter you received?
Rhonda:The kids aren't signing.
W: Did they read the letter?
R: I read them the letter and since I'm not signing off, and the letter states "'all or nothing'" then the kids decided not to sign either. I don't trust Neil and I think he's covering up where the money went. I've never seen a trust tax return and in addition the letter only gave me about a week to sign off. I don't want to rush into this.
W: You're making a big mistake. This is an opportunity to release mark and get the kids a lot of money this week.
R:The whole thing is erroneous.
W: Rhonda, you're saying opposite things. If this was an issue of time, then you should have consulted a lawyer and ask your questions (like why we insist that also Rhonda signs off in addtion to her kids). At that point you could have called me or had your lawyer write Neil's lawyer and ask for a couple of extra days. But you never even consulted a lawyer. This is a big mistake and it's a shame.
R: I've made lots of mistakes before and the kids have all suffered plenty.
W: This is about going forward and making a deal worth lots of money to your whole family. There have problems in the past but it's possible to start getting back on the right track.
R: I see it very differently. Have a safe trip back home.

* PLEASE GIVE THIS TO MATT WIESE.

MATT,

PLEASE CALL ME FOR A FURTHER UPDATE.

THANKS, Neil

(435) 901 2048

Confirm All Torvers not interested

Aunt Vickie talking:
Vickie Murdis - reconfirmed no interest
speaks on behalf of kids
w/ kids knowledge -

Tuesday, January 04, 2005 America Online: Neilbreton

DEPOSITION EXHIBIT 37 12-8-10

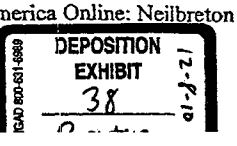
CSS 000038

Subj: **FW: trust letter**
Date: 1/6/2005 4:39:51 P.M. Mountain Standard Time
From: formaggio49@hotmail.com
To: neilbreton@aol.com

From: Judy Breton <berton@netvision.net.il>
To: neil <formaggio49@hotmail.com>
Subject: trust letter
Date: Thu, 06 Jan 2005 11:10:31 +0200

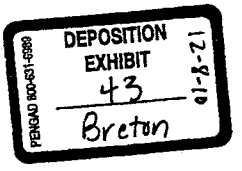
X-SID-PRA: Judy Breton <berton@netvision.net.il>
X-SID-Result: TempError
X-Message-Info: JGTYoYF78jE7aut1gAZYHnwW+jZZ4Kw3cwif2+l/DZI=
Received: from mxout4.netvision.net.il ([194.90.9.27]) by mc1-f30.hotmail.com with Microsoft SMTPSVC (6.0.3790.211);
Thu, 6 Jan 2005 01:11:08 -0800
Received: from netvision.net.il ([212.235.116.232]) by mxout4.netvision.net.il
(iPlanet Messaging Server 5.2 HotFix 2.02 (built Oct 21 2004))
with ESMTPA id <0I9W006NV1HJ5V@mxout4.netvision.net.il> for
formaggio49@hotmail.com; Thu, 06 Jan 2005 11:10:36 +0200 (IST)
Date: Thu, 06 Jan 2005 11:10:31 +0200
From: Judy Breton <berton@netvision.net.il>
Subject: trust letter
To: neil <formaggio49@hotmail.com>
Message-id: <41DD0087.6010609@netvision.net.il>
MIME-version: 1.0
Content-type: text/html; charset=us-ascii
Content-transfer-encoding: 7BIT
X-Accept-Language: en-us, en
User-Agent: Mozilla/5.0 (Windows; U; Win98; en-US; rv:1.0.1) Gecko/20020823
Netscape/7.0 (nscd2)
Return-Path: berton@netvision.net.il
X-OriginalArrivalTime: 06 Jan 2005 09:11:09.0000 (UTC) FILETIME=[A8DC3480:01C4F3CF]

Hi Neil,
This is a follow to our conversations yesterday. Let me know if you received Judy's and Aryeh's social for the two Kobb bank accounts. Please have the bank make a copy and mail to me for my Kobb records. Ask the bank if there is a way to make a proper pro rata percentage (23.95% and 76.05%) of the beneficiaries or if it is something that the two of us have to do 'internally' between ourselves.
Also, with regards to Rhonda's letter, you told me that you'd have the lawyer send me a copy of the draft for my input before mailing it out. I'm thinking that since Rhonda's kids issues will take a bit of time, you'll probably want to distribute everything to the early signers and leave $75,000.00 for the time being. That way your kids, my kids and you will get the money without delay as I know you're eager to get repaid by Jana. You were going to get an accountant to suggest the best tax way to give the gifts, maybe even adding Gail to the account so as to avoid the gift tax form that you'll need to file for all gifts over $11,000.00 per annum.
With regards to the letter to Rhonda, I think that we need to have all correspondences go directly to Breton, Jordan and Hayden. Rhonda and Mark are not the address. Besides, they're all over 21 years of age.
Lastly, what did you think of my name suggestions for Har Shalom property?
Take good care.
Love,
Willie
Best regards to Gail and tell the boys to have a safe trip back to Switzerland tomorrow. GO WITH THE RIGHT FOOT...



Subj: **checks on the way**
Date: 2/6/2005 5:24:34 A.M. Mountain Standard Time
From: berton@netvision.net.il
To: Neilbreton@aol.com

Hi Neil,
Welcome back from the big game expedition. Gail told me you sacked 20 geese. NO COMMENT. But I am considering reporting you to the save the whale and universe committee...
Fedex says that you'll have the checks by Tuesday afternoon. If you don't have it by then, I'll trace the tracking number.
Also, Vanguard notified us that the kid's money arrived.
Thanks and regards to the family.
Love,
Willie



NB004637

Monday, February 07, 2005 America Online: Neilbreton

BRE06720

Westlaw

126 P.3d 781, 538 Utah Adv. Rep. 69, 2005 UT App 489
(Cite as: 126 P.3d 781)

Court of Appeals of Utah.
Jon and Elizabeth TRIESAULT, Raymon and Stephanie Bori, individuals; Imagination Theaters, Inc., a corporation; and Imagination Theaters Holdings, LLC, a limited liability company, Plaintiffs and Appellants,
v.
The GREATER SALT LAKE BUSINESS DISTRICT, a Utah corporation dba Deseret Certified Development Company, Defendant and Appellee.

No. 20040811-CA.
Nov. 10, 2005.

Background: Movie theater owner sued certified development company (CDC) that originally help him develop his theater for breach of fiduciary duty, tortious interference with prospective economic relations, breach of duty of good faith and fair dealing, and intentional infliction of emotional distress after rival theater opened and owner's theater went into bankruptcy. The Fourth District Court, Provo Department, Fred D. Howard, J., entered summary judgment for CDC.

Holdings: Owner appealed The Court of Appeals, Billings, P.J., held that:
(1) owner failed to show that opening of rival theater with assistance of CDC caused his loss of revenue, and
(2) owner failed to show that CDC used improper means in assisting in opening of rival theater.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⚿863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases

No deference is given by a reviewing court to the trial court's resolution of the legal issues presented in a motion for summary judgment.

[2] Fraud 184 ⚿25

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k25 k. Injury and Causation. Most Cited Cases

Movie theater owner failed to demonstrate that opening of rival movie theater caused drop of revenue at his theater, as required to maintain claim that assistance to rival movie theater by same certified development company (CDC) that assisted owner in opening his theater caused owner's loss of revenue, in breach of CDC's fiduciary duty to owner.

[3] Torts 379 ⚿213

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)1 In General
379k213 k. Prospective Advantage, Contract or Relations; Expectancy. Most Cited Cases

To recover for intentional interference with prospective economic relations, plaintiff must show: (1) that defendant intentionally interfered with plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to plaintiff.

[4] Torts 379 ⚿241

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)2 Particular Cases
379k241 k. Business Relations or Economic Advantage, in General. Most Cited Cases

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Failed movie theater owner failed to demonstrate that certified development company (CDC) that assisted owner in opening his theater used improper means in assisting rival movie theater's development, as required element of intentional interference with prospective economic relations claim against CDC; there was no evidence that CDC falsified or concealed any information regarding rival theater from the Small Business Administration (SBA) in assisting rival theater in obtaining SBA loan, and federal regulation prohibiting conflict of interest by CDC did not prohibit CDC from assisting owner's competitors. 13 C.F.R. § 120.140(b).

***782** Allen K. Young, Young Kester & Petro, Provo, and Jonah Orlofsky, Chicago, Illinois, for Appellants.

Lynn S. Davies, Michael P. Zaccheo, and Nathan S. Morris, Richards Brandt Miller & Nelson, Salt Lake City, and Paul H. VanDyke, Elggren & Van Dyke, Sandy, for Appellee.

Before BILLINGS, P.J., DAVIS and ORME, JJ.

OPINION

BILLINGS, Presiding Judge:

¶1 Plaintiffs [FN1] appeal from the trial court's grant of Defendant Greater Salt Lake Business District, dba Deseret Certified Development Company's (Deseret) motion for summary judgment. Plaintiffs argue that the trial court erred by ruling that the Plaintiffs failed to raise triable issues of fact on their breach of fiduciary duty and intentional interference with prospective economic relations claims. We affirm.

FN1. The named plaintiffs in this action are Jon and Elizabeth Triesault and Raymon and Stephanie Bori as individuals; Imagination Theaters Inc., a corporation; and Imagination Theaters Holdings, L.L.C. For ease of reference, we refer to the plaintiffs collectively as either Triesault or Plaintiffs.

BACKGROUND [FN2]

FN2. Because summary judgment was entered against Plaintiffs, we state the facts in a light most favorable to them. *See Harline v. Barker*, 912 P.2d 433, 435 (Utah 1996).

¶2 In 1991, Jon and Elizabeth Triesault moved to Utah seeking a lifestyle change. The Triesaults joined Raymon and Stephanie ***783** Bori to pursue opening a movie theater in Spanish Fork, Utah (the Spanish Fork theater). They later formed two corporations, Imagination Theaters, Inc. and Imagination Theaters Holding, L.L.C. Mr. Triesault had a background in the movie and television industry, but had no prior experience in opening or owning a movie theater.

¶3 Triesault sought financing for the Spanish Fork theater with various banks. Triesault was unable to obtain conventional financing, so he hired Deseret, a certified development company (CDC), to help him through the process of obtaining a Small Business Administration (SBA) backed loan. Deseret was the only CDC the SBA authorized to operate in the area at that time. Triesault first met Mr. Vanchiere, a vice-president of Deseret, at Zions Bank in Provo, Utah. Triesault presented his business plan to bank officials for the purpose of obtaining advice and ultimately, financing for the theater. Immediately after the meeting, Vanchiere introduced himself to Triesault and said, "I don't think you're going to get anywhere with the bank. But I like your idea and I can help you get a[n] SBA loan. And I can also help you get a bank that would also partially fund your project." [FN3]

FN3. Triesault was to apply under the Section 504 loan program, which provides long-term permanent financing for small businesses. The financing typically involves a package with three components: the borrower contributes 10%, a private bank loans 50%, and a CDC loans the remaining 40%. The CDC's loan is funded by debentures that are backed by a 100% SBA guarantee. There is a complex application process involved in securing the SBA's approval for a Section 504 loan. After submitting the application, the SBA grants preliminary approval. After preliminary approval, the applicant must meet all of the conditions for final approval. After final approval, the applicant must continue to meet all of the SBA's requirements on an ongoing basis.

¶4 Vanchiere first worked with Triesault on the business plan for the Spanish Fork theater. Specifi-

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cally, Triesault and Vanchiere discussed that 10,000 people per movie screen was a generally accepted number used to determine the economic viability of rural movie theaters. The planned Spanish Fork theater would have eight screens, and the target market was from southern Provo to south of Nephi, Utah, an area that included approximately 80,000 people. FN4

> FN4. Deseret contends that "the evidence does not reflect that Vanchiere and ... Plaintiffs ever reached [the] conclusion [that the target market was from southern Provo to south of Nephi] together, or that Triesault's opinion about the geographical market was accurate."

¶ 5 Vanchiere provided Triesault with all of the necessary SBA application documents and provided assistance in filling them out. Those documents included the loan applications, personal financial statements, business plans, and individual resumes. After completing the necessary paperwork, Vanchiere and Deseret reviewed the application to decide if it would likely meet the SBA's criteria. Once Deseret decided the application would likely be acceptable, it submitted the application to the SBA. From this point onward, all communications with the SBA were handled for Triesault by Deseret.

¶ 6 After obtaining the necessary preliminary approval from the SBA, Vanchiere helped Triesault with the Spanish Fork theater's construction. At one point during construction, Triesault exceeded the theater's budget and Vanchiere advised Triesault on how to cut costs. Vanchiere continued to monitor the costs of the theater's construction, and he repeatedly discussed the construction project and costs with the builder himself. The Spanish Fork theater opened on November 26, 1997, as a "second-run" theater.

¶7 On or about May 27, 1998, the SBA backed financing closed. At closing, Vanchiere presented Triesault with a stack of documents and said that because Triesault trusted him, he did not need to read any of the documents. Triesault agreed and signed the documents without reviewing them.

¶8 Subsequent to the loan closing, Vanchiere visited the Spanish Fork theater an average of two weekends per month. During his visits, Vanchiere and Triesault discussed various aspects of the Spanish Fork theater's business, including what should be served at the concessions stand, what movies should be shown, and whether the theater should show first-run rather than second-run movies. ***784** Triesault provided Vanchiere with confidential information regarding how the Spanish Fork theater's business was doing. Although Vanchiere was involved in numerous meetings, he made no specific decisions with regard to equipment selection, architectural plans, or construction, and made no specific representation that he had expertise in the movie theater business.

¶ 9 After nine months of operating as a second-run movie theater without any profits, Triesault decided to show only first-run films. By the end of 1999, the Spanish Fork theater was consistently turning a profit. Around that same time, Deseret was working on a possible Section 504 loan package for a group of investors that sought to open a theater in Payson (the Payson theater), which is about ten miles away and within the target market area of the Spanish Fork theater. The Payson theater's appraisal report, which was part of its business plan, noted that twelve other movie screens were then located in southern Utah County, including the Spanish Fork theater and three older single-screen theaters. The appraisal concluded that with the addition of the Payson theater, there would be fifteen first-run screens in southern Utah County, although "[a]ccording to various sources, there [was] one other movie theater development in the pipeline for Utah County. This [was] located in south Provo [the Cinemark 16 Provo Town Centre Theater]." Moreover, the appraisal provided:

> At first glance it appears that there may not be sufficient demand or population for the proposed [Payson] theater; however, it should be noticed that a new project which is superior to existing supply frequently takes away market share from the existing supply-and in effect, makes the older projects no longer feasible, rather than the newer project. In the case of the [Payson theater] subject property, it will be the only theater in this market with stadium seating and all THX sound system. Given this fact, it is reasonable that the [Payson theater] subject property will be able to attract more than its "fair share."

¶10 The Payson theater opened in 2000. After its opening, the Spanish Fork theater never again showed a profit. The financial figures show that for the twelve

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months prior to the Payson theater's opening, the Spanish Fork theater's revenues were about two million dollars, but for the twelve months after the opening, revenues fell to 1.4 million dollars. By 2002, Triesault filed for bankruptcy, and as a result, Triesault lost his 1.5 million dollar personal investment.

¶ 11 Deseret's theater expert, Tony Rudman, opined that a variety of market factors contributed to the Spanish Fork theater's failure, particularly the opening of the Provo Cinemark 16 Theaters, the project earlier said to be in the pipeline. Moreover, Rudman testified that there was no way of knowing whether the establishment of the Payson theater contributed to the failure of the Spanish Fork theater. Triesault did not submit any expert testimony tending to show that the opening of the Payson theater caused the decline in revenue of the Spanish Fork theater.

¶ 12 Triesault filed suit against Deseret alleging breach of fiduciary duty, tortious interference with prospective economic relations, breach of the duty of good faith and fair dealing, and intentional infliction of emotional distress. Ultimately, the lower court granted Deseret's motion for summary judgment and dismissed all of Triesault's claims. Triesault now appeals.

ISSUE AND STANDARD OF REVIEW

[1] ¶ 13 Triesault argues that the trial court erred by granting Deseret's motion for summary judgment and ruling that Triesault failed to raise a triable issue of material fact on his breach of fiduciary duty and intentional interference with prospective economic relations claims. "In reviewing a grant of summary judgment, we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Harline v. Barker*, 912 P.2d 433, 435 (Utah 1996) (quotations and citations omitted). "Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law." *Id.* at 438 (quotations and citations omitted). Whether a party is entitled to summary judgment is a ***785** question of law, therefore "we accord no deference to the trial court's resolution of the legal issues presented." *Id.*

ANALYSIS [FN5]

FN5. We do not reach the issue of whether Deseret owed Triesault a fiduciary duty as we affirm on the basis of no causation.

I. Causation

[2] ¶ 14 The trial court concluded there was no record evidence from which a reasonable juror could conclude that the opening of the Payson theater caused Triesault's loss. We agree. Utah courts have held that summary judgment on the issue of causation is appropriate, "[n]otwithstanding the general rule" that causation is a jury issue, when the plaintiff cannot "show that a jury could conclude, without speculation," that the injury would not have occurred but for the defendant's breach. *Thurston v. Workers Comp. Fund*, 2003 UT App 438, ¶¶ 12-16, 83 P.3d 391; *see also Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996) ("[P]roximate cause issues can be decided as a matter of law ... when the proximate cause of an injury is left to speculation so that the claim fails as a matter of law."). Moreover, this court has affirmed summary judgment when the trial court found "the jurors would have had to engage in rank speculation to reach a verdict" regarding causation. *Clark v. Farmers Ins. Exch.*, 893 P.2d 598, 600-01 (Utah Ct.App.1995) (quotations omitted).

¶ 15 Triesault argues that Deseret's assistance to the Payson theater caused his loss. However, this claim is based simply on the timing of the opening of the Payson theater and the coincidental drop in revenues at the Spanish Fork theater. As a result, Triesault's claim would require a jury to engage in "rank speculation to reach a verdict" on causation. *Id.* at 600.

¶ 16 Deseret submitted expert testimony that the Spanish Fork theater could have failed due to any number of factors-including movie selection and the opening of the Cinemark 16 Provo Town Centre Theater. Triesault did not present any evidence tending to support his claim that the opening of the Payson theater caused the decline in revenue of the Spanish Fork theater. *See Schreiter v. Wasatch Manor, Inc.*, 871 P.2d 570, 574 (Utah Ct.App.1994) (stating expert testimony is required to establish causation unless "the propriety of the defendant's action is within the common knowledge and experience of the layman" (quotations and citation omitted)). Whether the Spanish Fork theater declined due to the Payson theater's existence is not something "within the common knowledge and experience of the layman." *Id.* Thus, Triesault has not convinced this court that

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there is a triable issue of material fact as to whether Deseret's actions caused Triesault's injuries, and we therefore affirm the trial court's grant of summary judgment on Triesault's breach of fiduciary duty claim.

II. Intentional Interference with Prospective Economic Relations

[3] ¶ 17 Triesault next contends that the trial court erred by granting summary judgment because there was a triable issue of material fact as to whether Deseret intentionally interfered with Triesault's prospective economic relations. To recover for intentional interference with prospective economic relations, Triesault must show "(1) that [Deseret] intentionally interfered with [Triesault's] existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to [Triesault]." *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982). Triesault argues that Deseret's promotion of the Payson theater interfered with Triesault's existing and potential economic relations with its movie patrons. Triesault further alleges this was intentional because the business plan for the Payson theater intended to succeed by luring away Triesault's customers.

[4] ¶ 18 First, Triesault argues that Deseret engaged in improper means by interfering with Triesault's economic relations with the Spanish Fork theater customers because Deseret engaged in "deceit or misrepresentation." *Id.* at 308 (quotations and citation omitted). Triesault contends that Deseret ***786** deceived the SBA into providing financing to the Payson theater that would allegedly cause the destruction of the Spanish Fork theater. Triesault argues that the Payson theater's business plan appraisal report depended upon taking significant numbers of Triesault's customers and making the Spanish Fork theater "no longer feasible." Moreover, because the "SBA's program is designed to foster successful businesses," Triesault argues that Deseret used improper means by seeking SBA approval when it had an alleged conflict of interest. However, there was simply no evidence before the trial court that Deseret falsified or concealed information from the SBA. Thus, the trial court properly concluded that the appraisal was insufficient to create an issue of material fact that could justify a finding of deceit or misrepresentation.

¶ 19 Triesault next argues that Deseret engaged in improper means because it "violat[ed] an established standard of a trade or profession." *Id.* (quotations and citation omitted). Triesault cites to the Code of Federal Regulations which states that a CDC may not "[h]ave a real or apparent conflict of interest with a small business with which it is dealing (including any of its Associates or an Associate's Close Relatives) or SBA." 13 C.F.R. § 120.140(b) (2005). However, the Code does not define what a conflict is, and the broad reading argued by Triesault is unrealistic under the process provided by the SBA for a Section 504 loan. Thus, we agree with the trial court's determination that Deseret did not engage in improper means as a matter of law.

CONCLUSION

¶ 20 Triesault has failed to convince this court that the trial court erred by granting Deseret's motion for summary judgment. We determine, as a matter of law, that there are no triable issues of material fact and that the trial court did not err in so ruling. Accordingly, we affirm.

¶ 21 WE CONCUR: JAMES Z. DAVIS and GREGORY K. ORME, Judges.

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Westlaw

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(Cite as: 893 P.2d 598)

Court of Appeals of Utah.
Bradley M. CLARK, Plaintiff and Appellant,
v.
FARMERS INSURANCE EXCHANGE; Darin G. Woolstenhulme; Donald S. Colovich; and Jennifer MacArthur, Defendants and Appellees.

No. 940446-CA.
March 28, 1995.

Passenger injured in complex multivehicle accident brought action against various drivers involved in accident. The Fourth District Court, Utah County, Lynn W. Davis, J., granted summary judgment to all drivers, and passenger appealed. The Court of Appeals, Davis, Associate P.J., held that no evidence established that passenger's injuries were proximately caused by conduct of any drivers sued.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⚿842(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) k. In General. Most Cited Cases

As question of law, entitlement to summary judgment is reviewed for correctness. Rules Civ.Proc., Rule 56(c).

[2] Negligence 272 ⚿202

272 Negligence
2721 In General
272k202 k. Elements in General. Most Cited Cases
(Formerly 272k1)

Prima facie case of negligence requires showing of: (1) duty of reasonable care extending to plaintiff; (2) breach of that duty; (3) proximate and actual causation of injury; and (4) damages suffered by plaintiff.

[3] Damages 115 ⚿185(1)

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k185 Personal Injuries and Physical Suffering
115k185(1) k. In General. Most Cited Cases

Evidence 157 ⚿571(9)

157 Evidence
157XII Opinion Evidence
157XII(E) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(9) k. Cause and Effect. Most Cited Cases

In personal injury action arising out of complex multivehicle accident, no evidence established that one passenger's injuries were caused by conduct of any driver named as defendant; passenger himself did not recall how he was injured, and passenger's own expert testified at deposition that he would be unable to determine mechanism of passenger's injuries without speculating or guessing.

***599** James G. Clark, Provo, for appellant.

Richard K. Spratley, Salt Lake City, for appellee Colovich.

Michael P. Zaccheo, Salt Lake City, for appellee Woolstenhulme.

Robert L. Jeffs, Provo, for appellees Farmers Ins. and

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MacArthur.

Before DAVIS, JACKSON, and WILKINS, JJ.

OPINION

DAVIS, Associate Presiding Judge:

Bradley M. Clark appeals from the district court's grant of summary judgment to defendants Darin G. Woolstenhulme, Donald S. Colovich, Farmers Insurance Exchange,[FN1] and Jennifer MacArthur.[FN2] The trial court ruled that because the proximate cause of Clark's injuries was unknown and purely speculative, Clark's negligence claim failed as a matter of law. We affirm.

> FN1. Farmers Insurance Exchange is named as a defendant based upon Jennifer MacArthur's insurance policy covering the acts of uninsured motorists. As defined by statute, John Doe # 1 was an uninsured motorist. See Utah Code Ann. § 31A-22-305 (Supp.1994).

> FN2. Defendants William H. King, Gordon V. Holbrook, Marcus Gilbert, William T. Hopkins, David Adamson, Rita M. Kennedy, and the U.S. Forest Service settled or were dismissed from the lawsuit in earlier stages of litigation.

FACTS

Clark was injured on December 10, 1989 as a result of a complex multi-vehicle accident occurring on the southbound Highway 89 overpass at its junction with I-15 in Farmington City, Utah. It was approximately 8:40 p.m., and it had been snowing earlier that day.

The series of accidents began when defendant Marcus Gilbert hit black ice on the overpass, lost control of his vehicle, and came to a halt, stalled in the right lane of traffic. Defendant Rita M. Kennedy next approached the accident scene, swerved to the left to avoid Gilbert's car, and also lost control of her vehicle. Her vehicle struck the guardrail several times and finally stopped in the roadway. Kennedy exited her vehicle and jumped over the guardrail to the east to avoid oncoming traffic.

The next vehicle to come upon the scene was an unidentified semi-truck (John Doe # 1) approaching in the right lane of traffic. John Doe # 1 veered quickly from the right lane to the left lane to avoid striking the stalled vehicles and proceeded down the road without stopping. When John Doe # 1 changed lanes precipitously, he or she cut off the vehicle driven by MacArthur, which was travelling in the left lane of traffic. Clark was a passenger in the MacArthur vehicle. MacArthur employed braking and turning maneuvers to avoid impact with the semi-*600 truck, and in so doing lost control of her car. The car came to rest against the lefthand (east) guardrail facing north toward oncoming traffic. At that point, no one in the MacArthur vehicle was injured.

Gilbert crossed the road toward the MacArthur vehicle, apologized, and said that his car was stalled and he could not move it. Clark opened the door of the MacArthur vehicle (on the oncoming traffic side, not the guardrail side) to assist Gilbert in moving his car.

Shortly after Clark opened the rear passenger door, another series of collisions occurred. First, defendant Woolstenhulme drove into the accident scene, struck Gilbert, and struck the MacArthur and Kennedy vehicles. Next, defendant Hopkins came to a stop in the left lane just behind the stopped vehicles, but was then bumped from the rear by defendant Adamson. Adamson went on to strike the side of Woolstenhulme's truck. Hopkins was next struck from the rear by defendant Colovich, causing his vehicle to collide with the front of MacArthur's vehicle.

At some point during this concatenation of events, Clark "came flying over the guardrail" in Kennedy's direction. Clark's knee and right hand were injured, resulting in over $21,000 in medical expenses and lost wages. No one saw Clark struck by any vehicle, nor is there any evidence explaining how he got over the guardrail and down the embankment. Clark has no memory of the accident after exiting the MacArthur vehicle.

Clark filed a complaint on April 17, 1991 sounding in negligence. In April of 1993, the trial court granted summary judgment to defendants State Farm Mutual Automobile Insurance Company, Farmers Insurance Exchange,[FN3] MacArthur, Colovich, and Woolstenhulme. For the purpose of its ruling, the court assumed these defendants were negligent. However, the court determined that "no direct evidence exists on the issue of causation as to [these

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defendants]." As a result, the court found that the jurors would have to "engage in rank speculation to reach a verdict" and that the "result would not be fair, nor just, nor appropriate for any of the parties." Clark appeals, arguing that the trial court erred in determining that the negligence of MacArthur, John Doe # 1, Woolstenhulme, and Colovich could not be proximately connected to his injuries.[FN4]

FN3. Appellant contends that the trial court granted summary judgment to Farmers Insurance Exchange "sua sponte." Farmers Insurance Exchange joined defendant State Farm Insurance's motion for summary judgment at oral argument; thus the court's order was not sua sponte.

FN4. Clark also appears to challenge the appellees' and trial court's reliance on unpublished deposition testimony. However, Clark has not argued that he made a contemporaneous objection to this reliance, nor does the record reveal an objection. In the absence of such an objection, we will not reach Clark's challenge. *See Broberg v. Hess*, 782 P.2d 198, 201 (Utah App.1989) (" '[C]ontemporaneo us objection or some form of specific preservation of claims of error must be made a part of the trial court record before an appellate court will review such claim on appeal.' ") (citation omitted). Moreover, we note that this error appears to have been invited in that Clark himself made extensive reference to unpublished depositions in his objections to appellees' motions for summary judgment and even in the briefs submitted to this court. "A party who leads a court into error cannot later complain of that error to obtain reversal." *Merriam v. Merriam*, 799 P.2d 1172, 1175-76 (Utah App.1990).

STANDARD OF REVIEW

[1] Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R.Civ.P. 56(c). As a question of law, entitlement to summary judgment is reviewed for correctness. *K & T, Inc. v. Koroulis*, 888 P.2d 623, 627 (Utah 1994). " 'We determine only whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material fact.' " *Id.* (quoting *Ferree v. State*, 784 P.2d 149, 151 (Utah 1989) (citation omitted)).

ANALYSIS

[2][3] A prima facie case of negligence requires a showing of: (1) a duty of reasonable care extending to plaintiff; (2) breach of that duty; (3) proximate and actual causation of the injury; and (4) damages suffered by ***601** plaintiff. *Schreiter v. Wasatch Manor, Inc.*, 871 P.2d 570, 573 (Utah App.) (citing *Williams v. Melby*, 699 P.2d 723, 726 (Utah 1985)), *cert. denied*, 879 P.2d 266 (Utah 1994). Defendants concede, for the limited purpose of summary judgment, that duty, breach of that duty, and damages have been shown. Thus, the issue on appeal is whether plaintiff's allegations can support a finding of proximate causation as to each defendant.

Proximate cause is generally defined as " 'that cause which, in natural and continuous sequence, (unbroken by an efficient intervening cause), produces the injury and without which the result would not have occurred. It is the efficient cause-the one that necessarily sets in operation the factors that accomplish the injury.' " *Mitchell v. Pearson Enters.*, 697 P.2d 240, 246-47 (Utah 1985) (quoting *State v. Lawson*, 688 P.2d 479, 482 n. 3 (Utah 1984)); *accord Steffensen v. Smith's Management Corp.*, 820 P.2d 482, 486 (Utah App.1991), *aff'd*, 862 P.2d 1342 (Utah 1993).

The question of proximate causation "is generally reserved for the jury." *Steffensen*, 820 P.2d at 486 (citing *Godesky v. Provo City Corp.*, 690 P.2d 541, 544 (Utah 1984)). Consequently, the trial court may rule as a matter of law on this issue only if: "(1) there is no evidence to establish a causal connection, thus leaving causation to jury speculation, or (2) where reasonable persons could not differ on the inferences to be derived from the evidence on proximate causation." *Steffensen*, 820 P.2d at 487 (citing *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990) (en banc)).

The trial court granted summary judgment to all the defendants party to this appeal because "no direct evidence exists on the issue of causation."[FN5] No one saw how Clark was injured, and Clark does not know how he was injured. Clark argues that the trial court's conclusion is in error, citing the affidavits and depo-

sition testimony of his accident reconstructionists. However, as the trial court noted, "plaintiff's own expert, Mr. Duvall, was asked in his deposition whether he would be able to determine the mechanism of plaintiff's injury without speculating or guessing. His response was 'no.' " When the other expert witness, David C. Stephens, was pressed to identify the vehicle that may have struck Clark, he responded, "I'm not certain. I can't say for sure." Moreover, Stephens testified in his deposition that "the facts of this total accident are so vague and unidentifiable that it is really hard to be precise in coming to any conclusion because there's nothing to be precise-these's no precise data on which to draw those conclusions."

FN5. The trial court recognized that "[i]f reasonable inferences can be drawn from the evidence, then the matter should be put to the factfinder." *See Lindsay v. Gibbons and Reed*, 497 P.2d 28, 31 (Utah 1972) (noting that jurors may "make justifiable inferences from circumstantial evidence to find negligence or proximate cause"). However, the court concluded that *any* evidence of causation would necessarily be the product of speculation, and the jury would have no basis for drawing inferences as to what occurred.

In light of the complete absence of evidence on causation, the trial court correctly granted defendants' motions for summary judgment. Clark has not met his burden to establish a prima facie case of negligence.[FN6] " 'When the proximate cause of an injury is left to speculation, the claim fails as a matter of law.' " *Mitchell*, 697 P.2d at 246 (quoting *Stahelí v. Farmers' Co-op. of S. Utah*, 655 P.2d 680, 684 (Utah 1982)).

FN6. Plaintiff has neither raised nor briefed the issue of the propriety of shifting the burden of proof to defendants, either before the trial court or this court. See *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948); *Vahey v. Sacia*, 126 Cal.App.3d 171, 178 Cal.Rptr. 559, 564 (App.1981); Restatement (Second) Torts § 433B (1965). Accordingly, we also decline to address it. *See Retherford v. AT & T Communications*, 844 P.2d 949, 965 n. 8 (Utah 1992); *Stokes v. Board of Review*, 832 P.2d 56, 60 n. 2 (Utah App.1992).

CONCLUSION

Due to Clark's failure to make a prima facie showing of facts demonstrating the existence of proximate causation, his case fails as a matter of law. Accordingly, we affirm the trial court's grant of summary judgment.

JACKSON and WILKINS, JJ., concur.

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OF COUNSEL:
BRAYTON ❖ PURCELL
STEVE RUSSELL

July 29, 2011

Honorable Anthony Quinn
THIRD JUDICIAL DISTRICT COURT
450 South State Street
Salt Lake City, UT 84111-1860

Re: *Breton v. Clyde, Snow & Sessions*
Case No. 090919546

Dear Judge Quinn:

This is my response to defense counsel's submittal of various citations to my client Neil Breton's deposition transcript, with attached exhibits and three cases. I have no complaint about the cases, nor do I have any complaint about the three attached deposition exhibits. I do think the deposition citations not only go far beyond what Mr. Wheeler offered to provide to the court at Wednesday's hearing. In addition, contrary to what is stated in Mr. Call's Wednesday July 27 letter to you, I do not believe the cited transcript sections support the defense claim that Mr. Breton "was skeptical that the Slater Brothers would sign releases at the time he and his two siblings released funds to the 12 grandchildren."

As is so often the case, when deposition transcript citations are cited, context is key. So, like when one party wants to use some deposition testimony at trial and the other party reviews the proposed citations and adds additional citations, I would like the court to read the following cited sections, to give context and clarity to those sections cited by the defense. I have attached to this email letter those transcript sections.

The defense has seven cited sections, I will respond seriatim:

1. Please read also p.121 l. 20- p.122 l. 13
2. Please read also p.123 l. 14- p.126 l. 25 (the "futility" the defense references Mr. Breton describing refers to an overall resolution of the family schism, not the releases)
3. Please read also p. 187 l. 12 - p. 188 l. 18
4. Please read also p. 222 l. 11 - p. 223 l. 11
5. ok
6. ok
7. Please read also p. 269 l. 3 - p. 270 l. 15 (defendants' failure to advise Neil NOT to distribute until all grandchildren signed)

In addition, please read the following:

p. 251 l. 22 - p. 252 l. 3 (Neil was prepared to hold the Slater Brothers' dollars indefinitely while Willie kept talking to them)

p. 258 l. 9 - p. 259 l. 6 (as to why Neil did not accept the Slater Brothers' counteroffer, or make a different counteroffer of more than $24,000)

Thank you for your consideration of these additional transcript citations, attached.

Very truly yours,

EISENBERG & GILCHRIST

Jeffrey R. Oritt

JRO/cm
cc: Keith Call(via email)
Marianad@email.utcourts.gov

lawyer, and I said, "Well, I know somebody in Utah, and since you both don't live in this country, let me talk to Hal and see" -- "explain to him the situation and see if he can put together a document that you can present to Rhonda and her children, and if they accept it, we'll reach a settlement. If they don't, then we'll have spent money on a document that won't go anywhere."

Q I think you said "at the insistence of your brother and sisters."

A Right.

Q Plural.

A That's correct.

Q Was Rhonda insisting --

A No, no. I meant brother and sister. Jana --

Q Sister?

A Yeah. Rhonda had nothing to do with this. It was Willie and Jana.

Q And you said there was a family dispute that was kind of the catalyst for this decision. What was that dispute?

A Well, party -- a few things. One, my mother -- you know, my mother, who we were all very close to, was really being torn apart by the fact

that her family was not speaking for years, and my nephews and I -- my sister had accumulated eight years of birthday presents that we'd mailed them and sent them all back. It was just -- it was just a real family mess that wasn't going anywhere. We weren't going to resolve anything.

Jana had a relationship with Rhonda, but it was strained. Willie occasionally spoke to Rhonda. I didn't speak to anybody in the Slater family, nor were they allowed to speak to me or any of my kids. They disowned all my kids. My daughters, who were very close to their aunt, were basically, you know, removed from any family communications.

And so it was probably partly my mother requesting we try to make a settlement. I know I had a meeting at my -- with my mom and my aunt, with Rhonda actually there, sometime years earlier, and she was crying about, "Why can't we all get this worked out?" And I, of course, explained that her husband is a problem that we can't resolve and work around. And then, of course, my mother was never allowed back in her house, and it just became a really ongoing ugly and uglier family issue that -- this was an attempt -- I thought it was futile, but Jana and Willie offered to try to negotiate, once

again, after several failed attempts at global settlement, and I said, "Look, you two trustees -- I'm only one vote. If the two of you can negotiate a deal that satisfies everybody, I'm willing to give up the judgment," which is a huge gift. That's a quarter million dollars more than anybody else got or was entitled to, and the judgment was still valid. I said, "That's what I'll give up, but I'm not engaging in any communications or writing any letters, talking to anybody. You negotiate it, you make the deal, and if you make a deal, I'll go to a lawyer and have it papered," and that's what I did, given the assurance that they had made a deal.

Q Okay. So, as I understand what you're saying, is that this is a general good faith attempt by you to settle the family feud that has been going on for years, correct?

A It was an attempt by all -- yes, all of us, to -- all the parties.

Q And who was it that came up with the idea that, "Well, let's pay each of the grandchildren some money and see if that takes care of the problem"?

A Jana. Jana was aware that I put money aside in a personal account -- in this account, actually. It was my money. It was about --

MR. ORITT: "This account," you're referring to Exhibit 11?

THE WITNESS: This account, the Exhibit 11 account. I had put money in this account. It was strictly collecting interest and taking care of some legal bills and tax returns that had to be filed when they were filed on behalf of Breton before it finally closed, and this was money that was -- that I intended, personally, to give to the grandchildren to honor my father's request, even though it wasn't a million dollars. It was about -- a little over a quarter million dollars, and if you include the judgment, it was over a half a million dollars. It was close to 600,000 if the judgment had been paid, so, again, even though it wasn't the full million dollars, it was my attempt to try to honor my father's wishes.

Q (BY MR. WHEELER) So it was Jana that suggested that, "Why don't you take that money and give" -- "divide it up among the grandchildren"?

A Right. Yes.

Q And so did you agree with her that that was something you would do?

A I actually didn't agree with her. I told her that, "I have no obligation to do anything until

the youngest child is 25 years old." At the time, the youngest child was eight or nine, or even younger, maybe five or six, so I had no incentive -- I had less than zero incentive, actually, to do anything. I had no obligation to do anything.

But Jana was in financial difficulties and, as a favor, asked if I would consider this. She spoke to Willie, who agreed, although Willie was financially very comfortable, didn't need the -- did not, nor did his children, need the money, nor did my children need the money, and, as far as I knew, the Slater children had inherited a lot of money from their grandparents, didn't need the money.

But Jana needed some money to buy a home or a down payment on a home and asked if I'd help her, and I said I would personally loan her the money, rather than get into this, because I thought this was a serious problem to try to resolve, and, of course, I made a mistake of accepting Willie's and her opinion, and tried to protect myself in terms of having an agreement that I was insisting, as best I could, in any way I could, that I would be protected, as well as the other trustees, and that's really the genesis of this lawsuit, that I was not protected.

Q Okay. Who came up with the $24,000 number?

A That was the amount of money divided by 15 grandchildren. It was $360,000, more or less, and if you multiply it times 15, you'll get 360.

Q And so Willie and Jana were pressing you to go along with this arrangement, correct?

A They were negotiating with Rhonda and getting assurances, verbal, that Rhonda wanted this behind her and demanded that the judgment -- at first Rhonda wanted only us to sign releases but that she did not want to sign a mutual release to release any of us, which, of course, was absurd and typical of her, even though I offered the judgment.

So it stalled for months while Willie and Jana kept trying to resurrect it, and I just stood back and watched documents flying back and forth between the three of them. And finally when --

MR. ORITT: Let me interrupt just to clarify. Time frame-wise, are you talking about before going to Clyde Snow or after, when you say --

THE WITNESS: Well, no. This was before I went to Clyde Snow, and then I went to Clyde Snow when we --

MR. ORITT: Well, stop, then. You can go back to where you were. As long as it's before Clyde Snow.

THE WITNESS: It was before the Clyde Snow. Then I met with Hal and specifically discussed with Hal, and maybe even showed him -- I don't recall if I showed him some of the letters that had been sent back and forth about what Willie was attempting to do, and Jana was trying to make family peace, and those things were all ongoing, and, really, the fight was really with Mark and me. It really wasn't about the grandkids or anybody else. It was really Mark Slater, almost from day one.

And so I reluctantly agreed that if we can get a document that everybody signs and everybody agrees to, that we would move forward and all of us can go on with our lives.

Q (BY MR. WHEELER) And that was the only impetus to do something, was to try to solve the family dispute?

A The only reason.

Q Let me show you the next exhibit, 3719, Exhibit 12.

(Whereupon Deposition Exhibit No. 12 was marked for identification.)

Q (BY MR. WHEELER) You have in front of you Exhibit 12 to your deposition, which purports to be a letter from Breton Slater dated May 18, 1998,

addressed to both you and Willie and Jana.

A Yes.

Q And it's signed by Bret. Do you remember receiving this?

A Yes.

Q Now, this was received prior to your decision to pay any money to the grandchildren, correct?

A Yes.

Q And he is essentially asking if you will advance money from the trust to help him with his education?

A That's correct.

Q And you respond, in the next exhibit, 3718.

(Whereupon Deposition Exhibit No. 13 was marked for identification.)

Q (BY MR. WHEELER) Do you remember writing that letter?

A Yes.

Q Was this sent by fax to him?

A Yes.

Q And it is in response to the prior exhibit that we looked at, correct?

A That is correct.

MR. CALL: This is Exhibit 13. I don't

A Orally.
Q And --
A As I recall, it was orally, but I don't recall the documents that were written.
Q Tell me, as best as you can recall, what you told Mr. Swenson you wanted in the letter.
A Initially I think it was Mr. Swenson, and then I think at one point it became Mr. Wiese, but I think -- if I -- and I'm assuming this is to Mr. Swenson -- that I brought him up to speed with the family history, I brought him up to speed, I think in great detail, because he explained that in his own deposition, that he understood there was -- he hated my guts, or some term, I think, some phrase that Hal referred to, that there was serious -- he understood, Hal did, that there was serious problems between Mark Slater and myself and that Willie and Jana had been negotiating, for the umpteenth time, to try to find a global settlement, and in Jana's case, as I spoke to you and answered your question earlier, she specifically needed the money, so when she said everybody needed it, she was being a little generous with the facts. She was specifically the only one that needed money.
I tried to accommodate her. As I said,

offered her -- to loan her the money, but she thought if we just distributed the money and ended all of this, she got indication from Rhonda that's what they all wanted, was a global settlement, and I was very leery, but when I met with Hal, I was very clear about, "I have no obligation to do this. I'm not even sure that it will get settled, but if we do it, it's got to be something that all of the trustees are protected. There are no repercussions."
Hal acknowledged that, understood that, and referred to it as "the all or nothing clause," which was critical, totally critical for me to be involved in any of this transaction. And, unfortunately, whatever Hal's best efforts were, he didn't accomplish that goal, and I ended up in a lawsuit.
Q Okay. Tell me exactly how you transmitted the information concerning your family feud to Mr. Swenson or Mr. Wiese.
A Just that there had been years of threats of litigation. I think I maybe even produced some documents. I don't know if I did or I didn't. Some of the letters that I'd seen or gotten. But I made it crystal clear, to use an old expression, that there was about as bad of blood between our families as there could be. Mark threatened to kill me three

times at a family function.
Q Did you tell --
A I told my lawyers. Yeah, of course, I told my lawyers. And they said, "What? Are you going to sue him about that?" I also had him -- my mother, in a written request, asked him not to be at the funeral, and he came with his own lawyer. Came to her funeral and made a big scene in front of 400 people.
Q And this is all information you've transmitted to the --
A No, no. I'm just -- no. I'm just sharing this with you right now. The information I told Hal was that there was bad blood and there was a lot of bad blood, and some before this lawsuit and some after, but the majority of it, 90 percent of it, happened before their letters and their lawsuit, and Hal was abundantly aware that this had to be an agreement that was bulletproof, airtight, and that everybody was protected.
That was the only charge I asked him. However he figured out how to do it, he would do it. I don't know who he conferred with, didn't confer with, but he and I had a very clear understanding, both of us, and he admitted that in his testimony,

that that was his responsibility, did not advise me to go talk to somebody else, that he would take care of it, and that is why we're sitting here today.
Q But the question that I asked you is, what was the format by which this information was transmitted?
A I just told you. I said I told him verbally that whatever document he drafted would be a global agreement, a global settlement, that Rhonda and Mark had a special situation that they were going to get released of a judgment, which nobody else got the benefit of. That was okay with me. That was going to be in writing. And that everybody would be sent this agreement and that everybody would either sign it or there would be no agreement, as far as I was concerned, and that I had no obligation to do anything further till sometime in the year 2024, so --
Q Can you identify with specificity any document that you gave to anybody at Clyde Snow & Sessions that portrayed this family feud that you're describing to us?
A I don't know if I could -- Hal already testified that he knew about it, and so did Matt, and --

A Yeah. I just --
Q -- the Clyde Snow lawyers gave you by draft form?
A Yeah. I just don't think we would have drafted this, but that's all right. We signed it.
Q I'm not suggesting you drafted it. I'm suggesting that the lawyers prepared it for your signature.
A Yes.
Q That's your recollection?
A Yes.
(Whereupon Deposition Exhibit No. 36 was marked for identification.)
Q (BY MR. WHEELER) But the letter that you did sign, that you and Willie did sign in the last exhibit, was prepared only after several drafts were exchanged with you and Willie and the lawyers received your comments, correct?
A That's what it appears to be, yes.
Q Exhibit 36 appears to be a letter from Matt Wiese at Clyde Snow & Sessions, dated January the 4th, which, again, is a letter telling Rhonda that if they don't sign and return the releases, that you're going to proceed with giving the gifts to the other grandchildren and leave out the Slaters; isn't that

right?
A Yes.
Q Was this letter sent at your request?
A This letter was probably the result of Matt, at this point, not receiving all the other -- the three signed agreements and letting me know that he hadn't received them, and I think we probably developed this letter together, just to let her know that we hadn't received it yet, and that Matt drafted it and sent it out.
Q But the other letters that we've talked about earlier set a deadline at the end of December, and obviously you had not received anything from the Slaters at that point, correct?
A That is correct.
Q And so this is an extension of the deadline?
A Yes.
Q Is that right?
A Yes.
Q And so would it be fair to say that you and Willie are trying to persuade Rhonda to have her kids sign off so this could be done?
A That's -- I think that's fair to say, yes.
Q In fact, Willie became heavily involved in

writing letters to Rhonda, saying, "Let's bury the hatchet" -- my words, not his -- "and let's solve this family dispute and sign off, and the money is sitting in the account for you," and this goes on for a long time, right?
A Yes, that's correct.
Q So these letters continue, and efforts by Willie, in particular, continue to try to convince Rhonda to get her kids to sign off? Is that fair?
A That's fair.
Q Thirty-eight, CSS.
(Whereupon Deposition Exhibit No. 37 was marked for identification.)
Q (BY MR. WHEELER) Exhibit 37 to your deposition appears to be an e-mail -- may have been --
A It was a fax, maybe.
Q It may have been a fax. It's addressed to you, correct?
A Yes.
Q Is it from Willie?
A No. It's actually -- well, it is from Willie, but it's from -- this says "MBreton," that he was in town at my mom's.
Q I see. That's why the "MBreton" --

A Yeah. He sent it from her machine.
Q Okay. So he's at your mom's place --
A Right. He's in the California --
Q -- which is the "MBreton909" address?
A That's correct.
Q And he's sending it to you, and it says, "Subject matter, the trust," and he's summarizing for you a conversation that he had with Rhonda the day before, correct?
A Yeah.
Q And, in fact, it appears to be a verbatim transcript of the conversation? Is that what you understand?
A Well, I see the "R" and -- yes. Again, I -- yes, that's what it looks like. Something to that effect.
Q And, again, he apparently has recorded this, because he says, "Willie:" quote, "Rhonda, I am going home tomorrow and wanted to know what's happening with the letter you received." Rhonda says, "The kids aren't signing."
A Right.
Q "Willie: Did they read the letter?
"Rhonda: I read them the letter, and since I am not signing off and the letter states 'all or

A Oh, okay.

MR. ORITT: Which was the preceding exhibit.

THE WITNESS: Oh, okay. Oh, oh. Right. Okay. Yes, yes. Okay.

Q (BY MR. WHEELER) -- "and have decided to sign them. Please allow a few weeks till everything falls in place."

A Yes.

Q So he's asking for paperwork?

MR. ORITT: Just so the record is clear, that -- what you just read is the -- this is Exhibit -- we're looking at Exhibit 51, but what you just read is also Exhibit 50.

MR. WHEELER: They're -- it's overlapped.

THE WITNESS: Yes.

MR. ORITT: So -- yeah. Fifty-one is showing the response.

MR. WHEELER: Oh, you're right. I read the wrong part. It's the top part that's new.

THE WITNESS: Right.

Q (BY MR. WHEELER) Yeah. And then he's responding, saying, "Thanks for getting back to me."

A Right.

Q And basically agreeing to give him the documents.

A Exactly. That is correct.

Q 6643 BRE.

(Whereupon Deposition Exhibit No. 52 was marked for identification.)

Q (BY MR. WHEELER) Again, did you see this correspondence that was taking place between Willie and Bret?

A Yeah, I actually did, because -- I was a little frustrated. First of all, Rhonda said she read it to all the boys. Now they don't know anything about the documents. Now they've got to look at the documents. Then -- you may have got the letter that says they never got the documents; can we resend them.

Q Yeah. We'll get to those later.

A Okay. Good. Good. Yeah, I see this one. I remember this one.

Q Do you know if the papers they were agreeing to sign were the papers prepared by Clyde Snow?

A Yes.

Q Okay. Not the ones Willie's lawyer had prepared?

A As far as I know -- well, Willie's lawyers

didn't have them signing. It had Rhonda and Mark, only, signing.

Q 6642.

(Whereupon Deposition Exhibit No. 53 was marked for identification.)

Q (BY MR. WHEELER) Do you recognize this? It's not a very good copy, but it appears to be an e-mail that was probably crinkled when it was copied.

A Yeah. I kind of remember seeing this one, actually, as well.

Q Looks like Willie is getting a little perturbed at this point.

A Yes.

Q Is that your handwriting at the bottom?

A No. That's Willie's.

Q And he is basically saying, "Why are you not signing? You've got everything."

A Right.

Q And you agreed to sign?

A Yes.

Q 6641 BRE.

A He also gave me another extension to September.

Q Yes. I'm assuming you agreed that you would hold that money when he was giving these extensions?

A I was prepared to hold the money for -- indefinitely.

(Whereupon Deposition Exhibit No. 54 was marked for identification.)

Q (BY MR. WHEELER) Exhibit 54 is a receipt and release, consent. Do you know if this document is the same one prepared by Clyde Snow, the one he's sending to Bret?

A It looks -- yeah. Just -- on the face of it, it looks like the language and the format.

Q It's been retyped, it appears?

A Yeah. So I'd have to look at -- if you want me to look at the --

Q No, you don't need to do that.

A But it's not -- I don't think -- I don't think he created a new document. I think he just took the language and retyped it.

Q Let's go to 6638.

(Whereupon Deposition Exhibit No. 55 was marked for identification.)

Q (BY MR. WHEELER) This appears to be an e-mail sent to both you and Willie.

A Yes.

Q Do you know why suddenly you are included

they waited till the day before to send this letter out. I mean, they had months to make this request and didn't.

I became fairly convinced that this was just not going to happen. They were not -- they had some other scheme in mind. I told Willie, you know, "The 24,000 is sitting there. It is theirs if they'll agree to those terms that we've offered," but I don't know what -- under what guideline I think they'd be entitled to a dollar more. They didn't do anything more. They're not -- there weren't any favored children. They were the same one of 15. My dad didn't even know nine of his grandkids, because they were all born after he died, so I -- I just didn't -- this wasn't going to satisfy them, either.

Q So you were convinced that this was an unreasonable offer, to settle for $66,000?

A Well, at the time.

Q Uh-huh.

A I mean, you look back at, you know, what I spent.

Q Of course, you were going to give them 24,000 each, so if you subtract what you were willing to give them from what they offered to settle for, it was not a lot of money, 126,000, if my --

A Well, if you want to -- I mean, no. It's a lot of money for no reason, and -- I mean, given what I know today, after spending over a million dollars in legal fees, they didn't get -- they got 75 -- they got, you know, hardly even more than this.

Q But they did get 75, so they got more than they offered to settle for?

A Yeah. They sued me for 4 million.

Q But, in any event, you didn't make a counteroffer or --

A Yeah, we did. The 24. We told them the 24 was still on the table.

Q Okay. All you did was reiterate the first offer and never --

A That was --

MR. ORITT: You've got to --

Q (BY MR. WHEELER) You never countered with any halfway measure or something like that to see if they'd take 50, for example, or something like that?

A No, because when Willie called them, their last comments to them were, "We've decided we don't want any of this blood money," not the 66, not the 24, not any of it, and they referred to it specifically as "blood money," "and we want nothing that Uncle Neil has his hands on," and so that kind

of closed that door after a year of --

Q Now, is this a conversation that Willie recounted?

A Willie recounted. They told this to Willie, and they called it blood money, and they don't want any money from anybody.

Q 6637.

(Whereupon Deposition Exhibit No. 56 was marked for identification.)

Q (BY MR. WHEELER) Again, this appears to be an e-mail to you -- a cc to you.

A Right.

Q With Willie also on the address.

A Uh-huh.

Q Asking if you'd received his e-mail.

A Yes.

Q So apparently -- this is the 21st of September. The e-mail he sent was the --

A 14th.

Q -- 14th, so you had not communicated with him or Willie had not communicated with him between that period, correct?

A That's correct.

Q Let's go to 6756.

(Whereupon Deposition Exhibit No. 57 was

marked for identification.)

Q (BY MR. WHEELER) I assume you remember this letter.

A I do. Very well.

Q This is a letter from the Slater children's lawyers.

A Uh-huh.

Q Essentially accusing you and the other trustees of incompetence in handling the trust, and worse, correct?

A Yes.

Q And so at this point, you knew that -- your suspicions were confirmed that they'd been talking to lawyers about their cause of action against you?

A That's correct.

Q Did you retain California counsel once you received this?

A Yes.

Q In fact, you talked to the lawyers at Clyde Snow, who advised you that it would be better to get California counsel?

A That's correct.

Q And, in fact, they gave you the names of some lawyers, right?

A Matt, I recall specifically, looked up on

have to return those funds, but, at the moment, we knew where to find them.

Q Earlier you said that the lawyers at Clyde Snow did not warn you, I think is the word you used.

A Uh-huh.

Q Or did not properly advise you with respect to what was happening with the attempts to get the releases. Can you tell me what advice you think they should have given you?

MR. ORITT: Object to the extent it calls for a legal conclusion. You can go ahead.

THE WITNESS: That, to the extent that they understood or knew the exposure that they were putting me under by even suggesting to distribute any of the money when all the -- when everything was -- everything spoke to an all-or-nothing arrangement, and then when they were both deposed and neither one of them felt that, you know, they had any obligation to tell me or to contact the California lawyer to see if maybe they should have gotten other advice concerned me greatly, because I wasn't -- obviously I wasn't protected, and I was sued, and so the one thing I asked of them didn't turn out the way that I was led to believe it was going to turn out.

And they could have easily said, "You can't

distribute any money to anybody until everybody signs," and that would have been the end of the story. I'd have been a million dollars richer, we wouldn't all be sitting here, and that's not what happened.

Q Okay. So one piece of advice that they didn't give you that you think they should have is that they should have told you not to make any distributions unless everybody signed?

A Absolutely.

Q Any other advice you think they failed to give you?

A Well, that was a pretty critical piece of advice I could have used, because, without everybody's signature, I guess there would have been no basis for a lawsuit, so I think that -- that might be the most critical component. There may be -- you know, I had a relationship with Hal. I didn't really have much of a relationship with Matt. I just met him during the -- you know, when this turned over -- was turned over to him, and came later to find out, you know, that neither one of them had a lot of experience in litigation law, which it would have been helpful if they'd have consulted with somebody that actually did have experience in that area.

Maybe even your firm. So yeah, I was -- I was --

Q Well, you previously testified that you and Willie made a decision to distribute the money, not the lawyers, but your complaint is they didn't tell you not to do it; is that right?

A My complaint is they never said that, "By doing anything other than the all or nothing, you leave yourself exposed to potentially a very" -- well, they didn't know how large the lawsuit would be. Neither did I. But you left yourself exposed, and that was -- again, this was -- I had no reason to do any of this consent, release, distribute money, any of that. There was no time frame that -- no gun to my head. There was 12 more years ahead of me, and so yeah, I'm a little upset.

Q Well, let me ask you this: At the time you and Willie decided to distribute money to the signing grandchildren, you knew, did you not, that the Slaters had not signed releases?

A At that time, I knew they had not signed the releases.

Q And you knew that, without them signing those releases, that they were free to sue you?

A I didn't focus on that at the time, but -- yes, apparently they would be free to sue me, as they

did.

Q Well, common sense tells you that if they haven't signed a release, there's nothing to stop them from suing you, correct?

A If that's their intention, yes.

Q And so at the time you made the distribution, you had to know, from your experience, that you still had exposure from the Slaters?

A There's a couple of attorney-client things that I'd like --

MR. ORITT: Which you're not going to speak to.

THE WITNESS: Which I'm not going to speak to about that, so --

Q (BY MR. WHEELER) Well, common sense tells you that if you don't have a release -- and with your business background, you knew that without a release, you were not protected from suit from the Slaters, correct?

A Not entirely. I think there was a couple other provisions in the will that prevented them from suing me, but that didn't come up in litigation at the time.

Q But you did know there were no releases signed by the Slaters, and you knew, at the time you

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OF COUNSEL:
BRAYTON ❖ PURCELL
STEVE RUSSELL

July 27, 2011

Honorable Anthony Quinn
THIRD JUDICIAL DISTRICT COURT
450 South State Street
Salt Lake City, UT 84111-1860

Re: *Breton v. Clyde, Snow & Sessions*
Case No. 090919546

Dear Judge Quinn:

I just received an e-mail copy of the letter Defendants' counsel in the above-referenced case sent you along with the three cases they promised you at the hearing this afternoon, the transcript from my client's deposition for the cited pages and their letter, and three additional exhibits. It seems to me this is far more than Mr. Wheeler suggested he would be sending you. Indeed, other than the citations from my client's deposition, which I believe exceed what Mr. Wheeler promised you at the hearing this afternoon, the additional exhibits that counsel attached should either have been included as part of their initial memorandum or reply memorandum. In effect, I believe this is supplemental briefing.

Unfortunately, because of a hearing I have in Summit County on July 28, 2011 and a lengthy meeting Friday, July 29, 2011, I will not be able to check the citations until mid-day Friday, July 29. At that time I will send another e-mail if I believe the citations do not represent what they are cited for.

Very truly yours,

EISENBERG & GILCHRIST

Jeffrey R. Oritt

JRO/cm
cc: Keith Call
Marianad@email.utcourts.gov

FILE COPY

RECEIPT AND RELEASE, AND CONSENT TO TERMINATION OF TRUST BY SWORN STATEMENT

The undersigned, NICHOLAS QUINN BRETON, as a beneficiary of the testamentary trust for Saul Breton's grandchildren created under paragraph 8 of the Last Will of Saul Breton, signed in May, 1981 (hereafter the "Grandchildren's Trust"), hereby:

1. Acknowledges receipt of a letter dated December 10, 2004 from Neil Breton and William Breton.

2. Acknowledges reading the letter referred to in the above paragraph 1 and understanding the contents thereof.

3. Acknowledges that the current trust assets of the Grandchildren's Trust are of little or no value.

4. Acknowledges that the proposed payment of $24,000 from Neil Breton will be in be in full payment and satisfaction of the undersigned's interest in the Grandchildren's Trust.

5. Acknowledges that in disbursing payment referred to in the above paragraph 4, Neil Breton is acting individually and not in his capacity as a Trustee of the Grandchildren's Trust.

6. Acknowledges that the payment referred to in the above paragraph 4 is from an individual account owned by Neil Breton and that such amount is being paid as an alternative means to honor the intent of the Grandchildren's Trust, which otherwise would be frustrated.

7. Releases Neil Breton, Jana Breton, and William Breton, as Trustees of the Grandchildren's Trust, from any and all liability in connection with the undersigned's interest in the Grandchildren's Trust.

8. Releases Rhonda Slater, as a former Trustee of the Grandchildren's Trust, from any and all liability in connection with the undersigned's interest in the Grandchildren's Trust.

[redacted]

NB001610

9. Consents to the termination of the Grandchildren's Trust.

DATED: December 13th, 2004

NEIL BRETON, as guardian for
NICHOLAS QUINN BRETON

STATE OF Utah)
) ss.
COUNTY OF Summit)

Subscribed, sworn to and acknowledged before me by Neil Breton, as guardian for Nicholas Quinn Breton, this 13th day of December, 2004.

Notary Public

LIZABETH A. MILLER
NOTARY PUBLIC - STATE OF UTAH
245 MOUNTAIN OAK COURT
PARK CITY UT 84060
My Comm. Exp. 06/04/2008

K:\DMS\A\Breton.Neil\Waiver&Consent grandchildren 12-11-04.wpd

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